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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL RAW MATERIALS, LTD.

Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
RHONE POULENC INC.,
TG SODA ASH, INC.,
GENERAL CHEMICAL PARTNERS,
TENNECO MINERALS CO.,
FMC WYOMING CORP.,
KERR-McGEE CHEMICAL CORP., and
AMERICAN NATURAL SODA ASH CORP.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel
EUGENE GRESSMAN
SETON HALL LAW SCHOOL
One Newark Center
Newark, N.J. 07102
(201) 649-8500

DAVID W. MARSTON
BUCHANAN INGERSOLL, P.C.
1200 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 665-8700

DAVID BERGER
HOWARD LANGER
Counsel of Record
JEROME MARCUS
CHARLES P. GOODWIN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Counsel for Petitioner International Raw Materials

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 426-8900

89 pp

QUESTIONS PRESENTED

In order to strengthen American firms in competing against foreign competitors, the Webb-Pomerene Act, 15 U.S.C. §§ 61-66, provides an exemption from the federal antitrust laws by allowing collusive activity by domestic competitors with respect to export trade conducted through an export trade association formed under the Act. The questions raised are:

1. To what extent does an entity, otherwise immune from the antitrust laws because of its membership in a Webb-Pomerene association, lose its exemption if the association includes a non-exempt party?

2. Do members of such an export trade association lose that exemption where a majority of the members of the association are subsidiaries of the foreign competitors of the association?

3. Whether a shipping terminal through which soda ash is exported by members of a Webb-Pomerene cartel of soda ash exporters has standing to protest (a) the cartel's loss of its Webb-Pomerene exemption from the antitrust laws, and (b) an antitrust conspiracy by the Webb-Pomerene cartel to impose horizontal fixing of terminalling rates and a boycott of the terminal?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The petitioner herein and plaintiff in the trial court is International Raw Materials, Ltd. The respondents herein and defendants below are Stauffer Chemical Company, Rhone Poulenc Inc., TG Soda Ash Inc., General Chemical Partners, Tenneco Minerals Company, FMC Wyoming Corp., Kerr-McGee Chemical Corp., and American Natural Soda Ash Corporation.

The following statement is made pursuant to Rule 29.1 of this Court. The subsidiaries of International Raw Materials, other than those wholly owned, are Dominion Raw Materials, Ltd., of Vancouver, British Columbia, and Pacific Raw Materials, Ltd., of New Zealand, which is owned 29% by Tasman Raw Materials, Ltd., a wholly-owned subsidiary of International Raw Materials.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner International Raw Materials, Ltd., respectfully petitions for a writ of certiorari to review the judgment and opinion issued by the court below.

OPINIONS BELOW

The decision of the Court of Appeals for the Third Circuit, for which review is sought, is reported at 978 F.2d 1318, 1992-2 Trade Cas. (CCH) ¶ 70,016 (3d Cir. Oct. 30, 1992). It is reprinted in the appendix hereto, pp. A-1-28, *infra*. This decision affirmed the grant of summary judgment for the respondents by the District Court for the Eastern District of Pennsylvania, which is reported at 767 F. Supp. 687, 1991-1 Trade Cas. (CCH) ¶ 69, 498 (E.D. Pa. June 13, 1991). It is reprinted in the appendix hereto, pp. A-30-42, *infra*.

An earlier opinion by the Third Circuit in this case, vacating summary judgment and remanding the case to allow further discovery, is reported at 898 F.2d 946 (3d Cir. 1990), and is reprinted in the appendix hereto, A-44-50, *infra*.

JURISDICTION

The judgment of the Third Circuit was entered on October 30, 1992.

The jurisdiction of this Court to review that judgment is invoked pursuant to 28 U.S.C. § 1254 (1). This petition is timely, having been filed within 90 days of the entry of the Third Circuit's judgment.

STATUTORY PROVISIONS

The statutory provisions relevant to this case are section 1 of the Sherman Act, codified as amended at 15 U.S.C. § 1, and the Webb-Pomerene Act, codified as amended at 15 U.S.C. §§ 61-66. These provisions are set forth in the appendix hereto, pp. A-52-56, *infra*.

STATEMENT

This case charges a horizontal conspiracy among respondents to fix terminalling rates for soda ash.[1] Amended Comp. ¶ 7-16. The conspirators, all of whom are named as defendants in this action and as respondents herein, are the six major pro-

1. Jurisdiction was vested in the court of first instance—the United States District Court for the Eastern District of Pennsylvania—by virtue of 28 U.S.C. § 1337 and 15 U.S.C. § 15.

ducers of soda ash and the American Natural Soda Ash Corporation ("ANSAC"), a corporation organized by these six producers under the Webb-Pomerene Act, 15 U.S.C. § 61 *et seq*. Petitioner International Raw Materials, Ltd ("IRM") is the operator of a terminal in Port Longview, Washington, that loads white bulk product, primarily soda ash, onto ships. "Between 1982 and 1984, IRM entered into separate terminalling agreements with several of the major soda ash producers who now belong to ANSAC. The rates on these contracts ranged from $5.65 to $8.46 per metric ton, depending on volume. After ANSAC was formed, each of the defendants who then had a contract with IRM assigned it to ANSAC and advised IRM to negotiate solely with ANSAC for future terminalling contracts. A July 1985 agreement between IRM and ANSAC set the rate for terminalling services at between $3.72 and $4.72, IRM argues that the reduction in rates was a result of ANSAC's price-fixing in violation of the Sherman Act . . . ." (A-46.)

1. *The Webb-Pomerene Act*. The Webb-Pomerene Act was enacted in 1918 by Congress, at the urging of the Federal Trade Commission, to enable domestic producers of products traded in world markets to compete against foreign manufacturers that engaged in monopolistic practices. The Act provides a narrow exemption from the antitrust laws for associations of domestic producers formed "for the sole purpose of engaging in export trade and actually engaged in such trade." 15 U.S.C. § 62. "Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 206 (1968). However, "[w]hile Congress was willing to create an exemption . . . to serve this narrow purpose, the exemption created was carefully hedged in to avoid substantial injury to domestic interests." *Id*. The exemption applies only so long as the association's concerted actions relate solely to its trade outside of the United States. A series of provisos to this grant of exemption preclude Webb-Pomerene associations from engaging in any concerted activity that restrains trade within the United States, either in "commodities of the class exported by such association" or "otherwise." 15 U.S.C § 62.

2. *The Formation of ANSAC.* ANSAC was formed under the Webb-Pomerene Act in 1983 by the six major American soda ash producers to promote American export activities. (A-2-3.) ANSAC's foreign competitors quickly grasped the threat posed by the new association, which effectively cartelized American production. To meet this threat, ANSAC's foreign competitors acquired ANSAC's producer members so that today all but one of ANSAC's members are either controlled or partially owned by the largest foreign soda ash producers. The District Court found:

> (1) Defendant Stauffer Chemical Company is wholly owned by the French corporation, Rhone Poulenc Chemie S.A., the third largest producer of soda ash in the world. (2) Defendant TG Soda Ash is wholly owned by the French chemical conglomerate, Societe Nationale Elf Aquitaine, a major manufacturer of caustic soda (a soda ash substitute). (3) Defendant General Chemical Partners is forty-nine percent owned by Australian Consolidated Industries, a major re-seller of soda ash. (4) Defendant Tenneco Minerals has entered into a joint venture with Japanese-owned ASAHI Glass, the largest Japanese producer of soda ash, to exploit Tenneco Minerals' soda ash reserves. (5) Defendant Kerr-McGee recently sold its soda ash reserves to North American Chemical Company, which is thirty-percent owned by the largest Korean producer of soda ash, Oriental Chemical Industries. (6) Only defendant FMC Wyoming Corporation is not linked to a foreign enterprise significantly engaged in the production or sale of soda ash or caustic soda. (A-31-32.)

In April, 1992, after this decision by the District Court, Solvay et Cie, the world's largest producer of soda ash, acquired, through a wholly owned subsidiary, Tenneco's remaining interest in its soda ash reserves—making that a joint venture of Solvay and ASAHI Glass. *See* Company News: Tenneco to Sell Minerals Unit, N.Y. Times, Apr. 24, 1992, § D, p.3. Shortly before the acquisition, the Commission of European Communities found that Solvay had allocated the major European soda ash markets with its major competitors over

many years in a scheme that replaced the soda ash cartel enjoined in *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59 (S.D.N.Y. 1949). *See* 1990 O.J. (No. L 152) 1; 1990 O.J. (No. L 152) 16; 1990 O.J. (No. L 152) 40.

3. *The Challenged Restraints of Trade.* Petitioner in this case alleges that ANSAC and its members—no longer a protective aggregation of domestic producers, but instead a worldwide monopolist—have acted just as economic theory suggests they would: restricting both worldwide and domestic output; raising the prices they charge both worldwide and domestic purchasers, *see, e.g.*, O'Neill Affidavit at ¶¶ 30-51; and lowering prices they pay their domestic suppliers, *see* Amended Complaint ¶¶ 7-16. In the Court of Appeals, petitioner cited the findings of the Commission of the European Communities that ANSAC had proposed to restrict its exports into Europe to levels below that which one or two of its members could "easily" provide, *see* 1990 O.J., *supra*, L 152 at ¶ 21(2), and that it intended not to engage in price competition despite its significant cost advantages over European producers. *Id.* L 152/3 at ¶ 8, L 152/59 at ¶ 26. Specifically, petitioner claimed that respondents restricted domestic soda ash output and forced the price paid for petitioners' terminalling services far below what respondents had paid before they acted in concert against petitioner. *See* Amended Complaint ¶ 15(a, b).

Respondents have defended the case not by denying that they restrained trade as petitioner alleged, but by asserting that the Webb-Pomerene Act authorized them so to act in concert. Petitioner answered by pointing to the trade-restraining conduct that forms the basis of its claim—conduct inherent in the inclusion of subsidiaries of foreign competitors in the association—and to the Act's explicit bars against such conduct—the restriction of domestic output, and the fixing of prices for terminalling services, that respondents engaged in because they are part of a worldwide cartel rather than the protective domestic association Webb-Pomerene permits.

4. *The Decisions Below.* An initial decision by the District Court dismissing the suit—on the ground that Webb-Pomerene's exemption permitted the challenged conduct—was vacated by the Third Circuit, which held that summary judgment had been entered prematurely before any discovery in a

complex case raising novel issues of antitrust law. (A-49.)

On remand, however, the District Court permitted discovery on only a single issue, involving an alternative ground for abrogating Webb-Pomerene immunity unrelated to this petition.[2] (A-34.)

The District Court refused discovery on the central question of the relationship between the foreign soda ash producers and their subsidiary producer members of ANSAC. (A-27.) Had it been permitted, such discovery would have shown that—as petitioner's Rule 56(f) affidavit alleges[3]—the respondents used ANSAC, not as a protective domestic association that enables American firms to compete effectively in the world market, but as a single, worldwide monopolist.

At the close of this limited discovery, respondents' renewed motion for summary judgment was granted on all issues. (A-30ff.) Following the respondents' lead, the District Court analyzed the scope of the Webb-Pomerene exemption without apparent consideration of the status of the foreign parents as *competitors* of the association or inquiry into whether the membership of foreign competitors in fact resulted in the expected conduct impermissible under the Act. Instead, the District Court addressed the question whether the Act's exemption extends to associations of which foreign companies are members. (A-36.) The court answered this question in the affirmative. However, in the case presented, it included within its holding subsidiaries of foreign competitors of the association. It based its answer upon the legislative history and, in the absence of any record, the District Court's own speculation regarding the economic consequences of allowing foreign ownership of a Webb-Pomerene association member without analysis of the economic consequences flowing from the foreign

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2. Petitioner had asserted that ANSAC was not engaged *solely* in export trade of soda ash, as required by the Webb-Pomerene Act, because it had an interest in a terminal in Portland that loaded products other than soda ash. The courts below held that the interest did not rise to level that would abrogate the immunity. The issue is not raised herein because it is essentially a factual dispute limited to this case and the relief sought by petitioner would provide the same relief on an alternative ground. The issue relating to the Portland terminal does not affect this petition.

3. O'Neill Affidavit ¶¶ 30-51.

owner's status as a competitor. (A-36-38.)

Alternatively, the District Court held that petitioner, as a vendor of services whose rates were fixed by the cartel, lacked "standing" to raise any argument arising from ownership of an association member by a foreign *competitor* and the consequent restraints inherent in the member-subsidiaries' legal obligations to their foreign parents, or the resulting international cartelization of the soda ash industry. (A-41 n.14.)

The Third Circuit affirmed. (A-1ff.) Like the District Court, the Third Circuit addressed the issue of foreign ownership of an association member, while disregarding the parents' status as a competitor.[4] (A-2.) In contrast to the District Court, however, the Court of Appeals found that "neither the statute nor the legislative history specifically resolves the question," (A-12) but nonetheless went on to adopt the District Court's economic analysis. The Third Circuit concluded that "foreign ownership is not necessarily at odds with an intent to benefit

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4. On appeal IRM raised primarily the issue of whether the exemption was lost because of the ownership of association members by foreign *competitors* of the association. *See* Brief for Appellant, No. 91-1511 (3d Cir.) at p.1. The questions presented were the following:

> 1. Should the issue of first impression of whether a cartel formed under the Webb-Pomerene Act may include wholly and partly owned subsidiaries of the foreign competitors and customers of the cartel, be decided on summary judgment before any discovery on the issue when the sole purpose of that Act is to strengthen American firms "in order to *compete with foreign cartels*," *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 206, 89 S.Ct. 361, 365-66 (1968)?
>
> 2. If so, as a matter of law, does a Webb-Pomerene association maintain its immunity when five of its six members are owned in whole or in part by foreign competitors or customers of the association?
>
> 3. Should summary judgment have been entered before discovery was permitted where there are specific averments of conspiracy between members of a Webb-Pomerene association engaged in the sale of soda ash and non-immune foreign competitors of the association, which averments are supported by a documented history of worldwide collusion and cartelization of the world soda ash markets extending from at least 1920 through 1990, which conspiracy would abrogate Webb-Pomerene immunity?

American interests." (A-12.) It did not discuss the economic implications of ownership of a cartel member by a foreign *competitor* or of the dominance of the cartel by subsidiaries of the largest foreign producers. It too refused to consider the actual conduct of the cartel.

Like the District Court, the Third Circuit held that IRM, an American vendor of services whose rates were fixed by the cartel, lacked standing to raise the argument because it was not a consumer of soda ash sold by the cartel. (A-16.) Although IRM claimed as damages depressed rates for the *terminalling services* it provided the cartel, the Court of Appeals held without explanation that "consumers of soda ash, for example, could still bring suit and raise these same claims" thus creating a risk of duplicative recovery (A-19), although consumers do not pay for or receive terminalling services, the subject of this suit, and could not have been harmed by the lower rates exacted by the cartel.

Alternatively, the Third Circuit concluded that if a worldwide cartel existed as a result of the presence of the subsidiaries of the foreign competitors within the association, their involvement would not abrogate the immunity association members enjoyed in their dealings with a terminal. (A-21.)

REASONS FOR GRANTING THE WRIT

The case presents three questions of exceptional importance: (1) whether foreign competitors may sit at the table with their American competitors shielded from antitrust liability by the Webb-Pomerene Act; (2) the degree to which immunity is forfeited by those colluding with non-immune entities; and (3) whether providers of terminalling services whose rates were fixed have standing to raise the loss of immunity. The first and third questions are matters of first impression but of grave consequence. The Third Circuit's resolution of the second question is in direct conflict with the majority in *Case-Swayne Co. v. Sunkist Growers Inc.*, 389 U.S. 384 (1967), and adopts the view of Justice White concurring. This court recently granted certiorari in *Hartford Fire Insurance Co. v. California*, No. 91-1111, to consider a closely related question.

The Third Circuit recognized that this case raises novel

and complex questions[5] left unresolved by either statute or legislative history.[6] However, it read expansively "a narrow and carefully limited exception" to the antitrust laws, *Pfizer, Inc. v. India*, 434 U.S. 308, 314 *n.12* (1978), *turning on its head the* legislative purpose to increase American foreign trade by allowing American firms to "underbid their foreign competitors." *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 212-213 (1968) (White, J., dissenting). Although finding that five of the six members of the association are owned in whole or in part by the largest foreign competitors (including the largest producers in America, Europe and the Far East) (A-3; A-31-32), the decisions below ignored both basic economic theory and petitioner's allegations of conspiracy in assuming that foreign entities, now controlling what is a world-wide cartel, will allow the Webb Pomerene association under their control to compete without restraints.

I. The Exemption Forfeiture Issue Raised Is Closely Related To That Currently Under Consideration By This Court In No. 91-1111, *Hartford Fire Insurance Co. v. California.*

The question regarding the scope of forfeiture of antitrust immunity is closely related to that presently before the Court in *Hartford Fire Insurance Co. v. California*, No. 91-1111, scheduled for argument on February 23, 1993. There certiorari was granted to consider the following question:

> 1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

Here the question raised is the extent to which members of an otherwise immune Webb-Pomerene organization forfeit that exemption by including non-immune members within the organization. This question may be answered in whole or in part in the Court's resolution of the pending case. Petitioner therefore

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5. A-13, A-49.

6. A-12.

suggests deferral of consideration of this petition pending adjudication of that matter in the *Hartford Fire Insurance* case.

II. Ownership of Webb-Pomerene Association Members By Foreign Competitors of the Association Necessarily Causes Conduct of Grave Consequence, Utterly Antithetical to the Law's Purpose, and Explicitly Barred by Its Provisos.

The Third Circuit's decision, allowing foreign competitors in the product to be exported by a Webb-Pomerene association to collude through subsidiaries under their control with their American competitors while shielded from the antitrust laws, raises legal questions of grave economic consequence for international commerce. In the present case, it sanctions international cartelization of a basic industry. The decision, which is utterly contrary to both the letter and spirit of the Webb-Pomerene Act, was reached on a barren record based on the Court's own economic analysis.

In *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 206 (1968), this Court held that the Webb-Pomerene Act's antitrust exemption is sharply focused:

> Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels. But while Congress was willing to create an exemption from the antitrust laws to serve this narrow purpose, the exemption created was carefully hedged in to avoid substantial injury to domestic interests.

Because the Third Circuit mistakenly analyzed this case as if petitioner's claim rested solely on the fact that respondents are foreign owned, rather than owned by the largest foreign producers of the commodity to be exported by the association,[7] the Third Circuit failed to assess the basic economic consequences of that relationship and the conduct of respondents that actually caused them to forfeit their antitrust exemption. The Third

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7. The Third Circuit stated the question as follows: "whether the Act applies to foreign-owned firms that produce goods in the United States for export to other countries." (A-14.)

Circuit also ignored the critical emphasis of the Webb-Pomerene Act, which is "upon furthering competition between domestic and foreign concerns and not the elimination thereof." *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 69 (S.D.N.Y. 1949) (enjoining the initial soda ash cartel).

Respondents' conduct falls well outside the "carefully hedged" exemption created by Webb-Pomerene. It is therefore fully subject to antitrust scrutiny. Even a brief comparison of that conduct to the list of proscribed actions in the Webb-Pomerene provisos, moreover, reveals the need for this Court's intervention, because of the great economic significance of the question to several basic industries, the significance of the market now cartelized by the respondents, and the manifest error committed by the courts below.

Here five of the six foreign owners are producers of soda ash in markets that ANSAC would naturally seek to penetrate and, in fact, sought to penetrate before the acquisition of its members by the foreign competitors.[8] The leading commentator on the Webb-Pomerene Act counsels that such conduct is specifically prohibited: "Another prohibition concerns *stock ownership by foreign producers* when the markets supplied by these foreign producers might in the absence of said companies be supplied from the United States." W. L. Fugate, *The Export Trade Exception To The Antitrust Laws: The Old Webb-Pomerene Act and The New Export Trading Company Act*, 15 Vand. J. Trans. L. 673, 691 (1982) (emphasis added). He goes on to point out that foreign purchasers are also prohibited to be members: "Other prohibited practices are gleaned from recommendations of the Commission in particular cases. Thus, an association has been prohibited . . . [from] *having foreign purchasers or customers as members*." *Id.* (emphasis added)

Webb-Pomerene's antitrust exemption survives only so long

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8. *See, e.g.*, Commission Decision, 19 December 1990, *Solvay* ICI, 1990 O.J. (No. L 152/1) at 3, in which the Commission of the European Communities found: "The United States producers of dense ash are viewed by the European manufacturers as the major competitive threat in their home markets." (Finding 8); Japan Soda Ash Barriers Lower?, *Chemical Marketing Rptr*, Dec. 14, 1987. (Ex. Y to O'Neill Affidavit) (describing ANSAC's efforts to penetrate Japanese market *before* ASAHI Glass purchased its interest in ANSAC member Tenneco's soda ash reserves).

as the "association, agreement, or act is not in restraint of trade within the United States." 15 U.S.C. § 62. In addition to barring actions that raise or lower the U.S. price "of commodities of the class exported by" the association, the Act also bars any conduct "which substantially lessens competition within the United States or *otherwise* restrains trade therein." *Id.* (emphasis added).

The complaint in this case, and the affidavit submitted in support of petitioner's response to respondents' summary judgment motion in the District Court, allege that respondents breached these provisos. Petitioner's claim is that, because respondents either are controlled or owned by the world's largest foreign soda ash producers, ANSAC has been transformed from a device to help United States exporters compete abroad into an instrument for cartelization of the entire world market. (O'Neill Affidavit ¶¶ 30-51.)[9] Because ANSAC members are owned by ANSAC's largest competitors abroad, ANSAC's communications and meetings have inevitably implemented a world-wide conspiracy in restraint of trade in soda ash—a conspiracy that has restrained trade both in and out of the United States.[10]

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9. The Court of Appeals distinguished a series of other cases on the ground that they involved an overt agreement among foreign competitors. The Court of Appeals thought no sufficient allegation had been made that the foreign companies were acting together because only their domestic subsidiaries—which are separately incorporated—sit at the ANSAC table. (A-15-16.) But focusing on such formalities ignores the reality of the way a single large enterprise functions.

In actions like this brought under the Sherman Act, this Court recognized that a single corporate enterprise pursues its economic interest in an integrated fashion. "They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 n.18 (1984).

10. Solvay et Cie, majority owner of what were formerly Tenneco's reserves, is the largest soda ash producer in the world (*see* Soda Ash: What Solution, *'IM' Glass and Ceramics Survey* 77 (1987) (Exhibit "O" to O'Neill Affadavit)); FMC is the second largest soda ash producer in the world (*id.* at 78); Rhone Poulenc, which owns Stauffer (now Rhone Poulenc Wyoming) is the third largest (A-31); ASAHI Glass, Solvay's co-venturer, is the largest producer in Japan (*id.*); Oriental Chemical Industries, co-owner of North American Chemical, is the largest producer in Korea (*id.*).

Trade in both soda ash and terminalling services has been restrained. Petitioner has been harmed by this cartelization because ANSAC and its members have used their joint market power concertedly to force down terminalling rates. Amended Complaint ¶ 15(a, b); O'Neill Affidavit ¶ 18-20. Moreover, petitioner has alleged that, as respondents have exercised their ANSAC-enhanced market power, the price for soda ash has risen both here and abroad. O'Neill Affidavit ¶ 30. This rise in price has necessarily reduced the quantity of soda ash shipped.[11]

In making these allegations, petitioner has claimed only that respondents would act as their economic self-interest teaches them to. As the most basic economic theory teaches, a market participant with substantial market power will exercise that power by restricting output and raising the price of its product and by restricting demand and lowering the prices it pays for its supplies. F.M. Scherer, *Industrial Market Power and Economic Performance* 10, 11 (2d ed. 1980). This case alleges that respondents did both. In so claiming, moreover, petitioners are only restating in American courts facts about a cartelized world market for soda ash already found by the Commission of the European Communities. *See* 1990 O.J. (No. L 152) 1; 1990 O.J. (No. L 152) 16; 1990 O.J. (No. L 152) 21; 1990 O.J. (No. L 152) 40. The Commission found extensive illegal

11. Use of Webb-Pomerene associations to restrain world-wide trade in the soda ash market has a lengthy and fully documented history, beginning with *United States v. Alkali Export Ass'n*, 86 F. Supp. 59 (S.D.N.Y. 1949) (holding that the Act did not insulate from antitrust review an association's restrictive agreements with foreign producers). In *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950), the court held that the Act would not insulate from review the formation, by all members of a Webb-Pomerene association, of a jointly owned foreign subsidiary. *See also United States v. FMC Corp.*, 306 F.Supp. 1106 (E.D. Pa. 1969); *Horizons Int'l, Inc. v. Baldridge*, 624 F. Supp. 1560 (E.D. Pa. 1986), *vacated on other grounds*, 811 F.2d 154 (3d Cir. 1987) (both discussing continued collusion by soda ash manufacturers and in related minerals). As a result of this history of collusion, the Antitrust Division of the Justice Department recommended against issuing an export trade certificate immunizing the soda ash industry under the Export Trading Company Act of 1982. *See* Letter from P. McGrath, Ass't Att'y Gen'l, Antitrust Div., to I. P. Margulies, Acting Gen'l Counsel, Dep't of Commerce, Mar. 26, 1984 (O'Neill Affidavit Ex. W). Only a limited certificate was issued, granting no immunity for joint sales and allowing only data collection.

market allocation by three major European soda ash producers. The principal conspirator in those cases—Solvay—subsequently purchased the majority interest in respondent Tenneco's soda ash deposits.[12] The same day it rendered the *Solvay* decision, the European Commission rejected an application from ANSAC to market all defendants' soda ash to the European Communities on a joint basis. The decision confirmed petitioner's economic analysis. The Commission found, following full hearing, that despite ANSAC's significant cost advantages over the European producers and its potential as their major potential competitor, *see id.* L 152/3 at ¶ 8, ANSAC was proposing to restrict the sales of all of its members to the European Community to quantities below those that one or two of its member could "easily" provide. *See id.* L 152/58 at ¶ 21(2). The Commission also found that ANSAC did not intend to compete on price despite its cost advantage over European producers. *See id.* L 152/59 at ¶ 26. Thus, the inevitable and alleged consequence of including subsidiaries of foreign competitors within the Webb-Pomerene association were fully borne out upon the full record denied petitioner here.

The renewed cartelization of the soda ash industry would alone warrant granting the writ. It is a basic mineral used in glass, soap and detergents, paper, textiles, and feed.[13] Total production in 1990 was valued at $836,000,000, of which $346,000,000 was accounted for by exports.[14] The United States

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12. Solvay's co-venturer, ASAHI Glass was found to have engaged in restrictive trade practices with regard to soda ash by the Japan Fair Trade Commission, including formation of a Japanese cartel in 1983. *See* Japan Soda Ash Barriers Lower?, *Chemical Marketing Rptr,* Dec. 14, 1987 (Exhibit "Y" to O'Neill Affidavit).

After an ANSAC complaint, the Japan Fair Trade Commission threatened the Japanese markets with a second JFTC investigation in 1985. ASAHI Glass, Japan's largest producer of soda ash, then purchased its interest in ANSAC member Tenneco. *See id.*; ASAHI, Tenneco Take Soda Ash Vows, *Chemical Week*, Mar. 7, 1990. (Exhibit "Q" to O'Neill Affidavit).

13. Dennis S. Kostick, *Soda Ash*, in Bureau of Mines, *Annual Report* 1, 1-2 (1990).

14. *Id.*

is the world's largest soda ash producer.[15] The threat posed by the creation of ANSAC to the foreign markets was neutralized when the foreign producers acquired all but one of ANSAC's members.

The question of whether subsidiaries of foreign competitors may sit at the table with their American counterparts while protected by the Webb-Pomerene Act is of critical importance. Foreign ownership of American business increased by 133% between 1980 and 1988.[16] Subsidiaries of Sony Corp., Matsushita, and the Australian media conglomerate, the News Corporation, all sit as members of a series of Webb-Pomerene associations controlling exports of the film industry.[17] A subsidiary of the French chemical giant Elf-Aquitaine, S.A. sits as a member of the American Phosphate Export Association.[18] Basic industries, such as the poultry, cotton, sulphur, cigarette, and peanut industries, maintain Webb-Pomerene associations,[19] certain of which also contain subsidiaries of foreign competitors.[20] The question is, thus, one of critical legal and practical importance, involving significant questions of antitrust policy, but was decided upon a barren record, contrary to *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963) (reversing summary judgment on grounds that major issues of public policy in interpretation of antitrust law had been resolved in absence of full records).

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15. *Id.*

16. *See* U.S. Dep't of Commerce, *Statistical Abstract of the United States* 432, 794 (111th Ed. 1991).

17. *See* FTC, *Export Trade Associations and Their Members Registered Pursuant to the Webb-Pomerene Act* (January 31, 1992) at entries for AFRAM Films, Inc.; American Motion Pictures Export Co., Inc.; Motion Picture Export Ass'n of America. Inc.

18. *Id.* at entries for American Phosphate Export Ass'n and Phosphate Rock Export Ass'n (Texasgulf Inc. owned by EIF-Aquitaine).

19. *Id.* at entries for American Cotton Exporters Ass'n, American Poultry U.S.A., American Sulphur Export Corp., United States Cigarette Export Ass'n, Tri-State Export Corp.

20. *Id.* This is true of the cotton and cigarette associations.

III. The Third Circuit's Opinion Conflicts Directly with *Case-Swayne* and Creates Confusion Regarding the Scope of Forfeiture Where a Non-Exempt Entity Is a Member of an Otherwise Exempt Organization.

The majority in *Case-Swayne v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), held that an otherwise exempt association which included non-exempt members forfeited all immunity and could not assert a statutory immunity as a defense to a suit based on section 1 of the Sherman Act, 389 U.S. at 395-96, the position advanced by petitioner herein.[21] The Third Circuit ignored *Case-Swayne*, a case to which it was cited, and held that if ANSAC members forfeited their immunity, such forfeiture would be partial, but not forfeiture of their entire immunity, thus rejecting the majority opinion in *Case-Swayne* and adopting the position of the concurring opinions of Justices White and Harlan. The opinion below also conflicts with the assumption implicit in *National Broilers Marketing Ass'n v. United States*, 436 U.S. 816, 823 (1978) (Blackmun, J.) ("to avoid liability under the antitrust laws for its collective activity, *all* its members must be qualified to act collectively." (emphasis by the Court)).

The scope of the forfeiture of an antitrust exemption, where a non-exempt member is included within an association organized under a statutory exemption, resulted in four opinions in *Case-Swayne*. That issue and its corollary, derived directly from *Case-Swayne*, that "an exempt entity forfeits antitrust exemption by acting in concert with non-exempt parties," *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979), citing *Case-Swayne*, have engendered confusion both in the decision below and within the Ninth Circuit, regarding the extent of the forfeiture resulting in each situation.

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21. While the Third Circuit sought to distinguish its holding under the Webb-Pomerene Act from those under other exceptions based upon the limited enforcement powers granted the Federal Trade Commission, which do not provide for forfeiture of the association's immunity, 15 U.S.C. § 65, the relevant remedial provisions of the Capper-Volstead Act, 7 U.S.C. § 291 *et seq.*, construed in *Case-Swayne* do not provide for such relief either and confer powers very similar to those of the FTC on the Secretary of Agriculture. Still this Court held the immunity was forfeited as a defense to a private civil suit.

In *Case-Swayne*, the petitioner had not yet proven that its injury arose directly from the inclusion of non-exempt entities in the otherwise exempt cooperative. Nevertheless, the majority held that the cooperative and its members lost all immunity in the suit, notwithstanding the posture of the petitioner. This led to separate concurrences by Justice White (joined by Justice Stewart), by Justice Harlan, dissenting in part, and by Justice Douglas, *dubitante*.

Justice White would have limited the forfeiture solely to the claims flowing from activities taken in concert with the non-immune members and would have required the *Case-Swayne* petitioners to prove such claims on remand to establish any forfeiture, the position apparently adopted by the Third Circuit here:

> An exempt organization may not conspire with an outsider to violate § 1, but if it does, it does not forfeit its immunity except for that transaction. I see no reason for a different consequence where the conspiracy or combination takes the form of granting membership in the exempt organization.

389 U.S. at 400-401.

Justice Harlan concurred for the reasons asserted by Justice White and dissented in part. He would have held that the exempt entity prospectively "would forfeit its entire . . . antitrust exemption were it to elect to continue the membership of the agency associations." 389 U.S. at 400.

Justice Douglas would have reserved the question—which had not been argued—for another day. *See id.* That day has come in this case.

Here, the Third Circuit held that petitioner could not challenge inclusion of the subsidiaries owned by the foreign competitors because the injury from such inclusion would have fallen primarily upon soda ash consumers, not upon a vendor of services whose rates were fixed by the cartel. The Court of Appeals held that any immunity forfeited would have been limited to that flowing from the transactions with non-immune parties and that the association and its members would otherwise retain their immunity, putting it in direct conflict with *Case-Swayne* and *National Broiler Marketing Ass'n*.

Like the Third Circuit, the Ninth Circuit has issued a series of decisions underscoring the tension and confusion engendered by *Case-Swayne's* holding of forfeiture of entire immunity and its corollary involving forfeiture from conspiring with non-exempt entities.

Beltz Travel Service v. International Air Transportation Ass'n, 620 F.2d 1360 (9th Cir. 1980), held that any immunity attaching to airlines under the Federal Aviation Act of 1958 was forfeited when they conspired with non-immune entities, even if the non-immune entities' activities were otherwise entirely immune. Rather than following *Case-Swayne*, the Ninth Circuit derived a theoretical framework based on principles of joint and several liability of a conspirator for the acts of co-conspirators and held the immune conspirators liable for the acts of their non-immune co-conspirators. Yet, in *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n.12 (9th Cir. 1983), the Ninth Circuit characterized as "frivolous" an argument that an exempt entity forfeited all of its exemption from the antitrust laws because of its involvement with a non-exempt entity. That case involved forfeiture of McCarran-Ferguson immunity arising from an insurance provider's arrangement with a pharmacy.

In *In re Insurance Antitrust Litig.*, 938 F.2d 919, 928 (9th Cir. 1991), the subject of *Hartford Fire Insurance Co.*, No. 91-1111, now pending before the Court, the Ninth Circuit, following *Royal Drug* and *Beltz*, held that American primary insurers forfeited their immunity under the McCarran-Ferguson Act by enlisting the aid of non-immune foreign reinsurers in a conspiracy directed against insurance consumers.[22] Petitioners in *Hartford Fire Insurance* argue that a consequence of the Ninth Circuit opinion is to strip them of their entire immunity as a result of their dealings with the non-immune entities. Respondents argue that the Ninth Circuit need only have found that the insurers lost their immunity solely for the harm flowing from the transactions with the non-exempt parties. Thus, whether the Court will reach the issue raised in this petition in *Hartford Fire Insurance*, depends upon the construction ultimately placed upon the Ninth Circuit's actions.

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22. The District Court in that case, following *Klamath-Lake*, had held directly the contrary.

The grant of certiorari on the related question in *Hartford Fire Insurance* and the manifest conflict between the Third Circuit's decision herein and this Court's holding in *Case-Swayne* and *National Broiler Marketing* underscore the importance of the question and the need for its definitive resolution by this Court.

IV. The Conflict Between the Opinion Below and *Case-Swayne* Raises Important Questions of Standing to Challenge the Antitrust Immunity of a Webb-Pomerene Cartel.

A. *The Third Circuit's Analysis Conflicts with* Case-Swayne.

The Third Circuit's conclusion that petitioner lacked standing to argue that respondents forfeited their immunity because of their relationship with foreign competitors—whether because of inherent or overt collusion—is directly contrary to *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), a case the Third Circuit simply ignored although cited by petitioner below.

Petitioner sued to recover for the depressed rates it received as a result of respondents' fixing of *terminalling* rates, a *per se* violation of the antitrust laws, for which petitioner as the direct vendor to the respondents of the service for which the rates were fixed plainly had standing. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Respondents asserted the Webb-Pomerene Act as a defense. Petitioner, in turn, asserted several grounds—all following *Case-Swayne Co. v. Sunkist Growers, Inc.*—for abrogating the *entire immunity* as a defense. Petitioner argued that the subsidiaries of foreign producer-competitor's of the association did not qualify for Webb-Pomerene immunity because their presence at the table colluding with the association members was antithetical to the Act's intent to increase competition by American producers and their foreign competitors. By including a non-exempt party in the association, respondents forfeited their immunity in its entirety under *Case-Swayne*.

Petitioner also argued, based upon evidence adduced by foreign tribunals, that respondents had actually conspired with non-immune foreign producers, which under the *Case-Swayne*

corollary that "an exempt entity forfeits antitrust exemption by acting in concert with non-exempt parties," *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979), also was grounds for abrogating immunity in the entirety. Had petitioner been provided opportunity to establish either circumstance, respondents would have been stripped of the Webb-Pomerene immunity they asserted as a defense against petitioner's claim of price fixing.

The Third Circuit, having rejected the majority opinion in *Case-Swayne*, analyzed petitioner's claim as though it were suing to recover for *overcharges* resulting from the worldwide cartelization of the soda ash industry. It concluded that "the harm to domestic competition caused by international cartelization of the soda ash industry is irrelevant to IRM's suit," (A-16), holding that petitioner was not a consumer or producer of soda ash.

The Third Circuit went on to apply a standing analysis derived from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), and *Illinois Brick Co. v. Illinois*, 431 U. S. 720 (1977), concluding that because petitioner was not a purchaser or producer of soda ash, it lacked "standing." However, petitioner did not claim damages for *overcharges* arising from the international cartelization of soda ash. It claimed its terminalling rates were *depressed* by a conspiracy to depress soda ash terminalling rates and that respondents could not assert the Webb-Pomerene Act as a defense because they forfeited their immunity.

The effort to impose a standing analysis on the facts here resulted in manifest illogic. Thus, citing *Illinois Brick*, 431 U. S. at 730, the Third Circuit held petitioner lacked standing "because the industrial consumers of soda ash, for example, could still bring suit and raise these same claims, permitting IRM to go forward with this claim creates the risk of duplicative recovery." (A-19.) Not so at all. Petitioner seeks to recover for *underpayments for terminalling rates* resulting from price fixing of terminalling rates; industrial consumers would seek recovery for *overcharges for soda ash* resulting from cartelization of the soda ash industry. Industrial consumers could only have benefitted from the depressed terminalling rates that

injured petitioner. The fact that respondents wrought injury on two distinct groups does not preclude either from recovering. *See Blue Shield of Va. v. McCready*, 457 U. S. 465, 475 (1982).

Similarly, the Third Circuit held, based on *McCready*, that petitioner fails to allege that the "alleged anticompetitive effects in the terminalling market can . . . be said to be 'inextrically intertwined' with the alleged soda ash cartel." (A-18.) But, as a factual matter, what can be more intertwined with the cartel than the loading of its product on to ships—a function without which the cartel presumably could not function, a function so intertwined with the cartel's export trade activity that it provided the very basis for respondents' assertion that Webb-Pomerene immunity shielded their joint fixing of terminalling rates?

B. *The Provisos of the Webb-Pomerene Act Specifically Protect Domestic Commerce.*

Even were "standing" an issue of any relevance here, there is nothing in the provisos to the Webb-Pomerene Act limiting their protection to consumers or competitors as the Third Circuit held. The Act contains several provisos. The first protects the "export trade of any competitor." 15 U.S.C. § 62. The second prohibits acts affecting prices of "commodities of the class exported by the association." *Id.* However, the final proviso provides broad protection to all, prohibiting any agreement "which substantially lessens competition within the United States or otherwise restrains trade therein." This is consonant with *McCready*, which reiterated the broad language of *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948):

> As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

457 U. S. at 472

There is no basis to read the plain language of the Webb-Pomerene Act, which leading commentators believe to provide even greater protection against collusion than the Sherman Act, as a narrower provision providing less protection.[23]

23. *See* Fugate, *supra*, 15 Vand. J. Trans. L. at 678:

> The above provisions may indicate why there is considerable apprehension in the business community regarding the use of the exemption. The Webb Act exempts export associations from the Sherman Act upon such strict conditions that the Sherman Act appears to be reinforced with additional prohibitions against acts in foreign trade that substantially lessen competition in the United States or otherwise restrain trade therein.

CONCLUSION

Petitioners respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

DAVID BERGER
HOWARD LANGER
Counsel of Record
JEROME MARCUS
CHARLES P. GOODWIN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000
Counsel for Petitioner

EUGENE GRESSMAN
SETON HALL LAW SCHOOL
One Newark Center
Newark, NJ 07102
(201) 649-8500
Of Counsel

DAVID W. MARSTON
BUCHANAN INGERSOLL, P.C.
1200 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103
(215) 665-8700
Of Counsel

APPENDIX

OPINION OF THE THIRD CIRCUIT IN No. 91-1511

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1511

INTERNATIONAL RAW MATERIALS, LTD.
Appellant

v.

STAUFFER CHEMICAL COMPANY, RHONE POULENC INC., TG SODA ASH, INC., GENERAL CHEMICAL PARTNERS, TENNECO MINERALS CO., FMC WYOMING CORP., KERR-McGEE CHEMICAL CORP. AMERICAN NATURAL SODA ASH CORP.,
Appellees

On Appeal from The United States District Court
Eastern District of Pennsylvania
(D.C. Civ. No. 87-07541)

Argued: December 13, 1991

Before: BECKER, GREENBERG and ALITO
Circuit Judges.

(Filed: October 30, 1992)

OPINION OF THE COURT

Becker, *Circuit Judge.*

This appeal presents a question of antitrust immunity under the Webb-Pomerene Act, 15 USC §§ 61-65 (1988). Plaintiff International Raw Materials ("IRM"), a marine terminal operator, appeals from an order of the district court for the Eastern District of Pennsylvania granting, for the second time,

summary judgment against the plaintiff in its antitrust suit against an association of soda ash producers and its members. The district court held that the association and its members were exempt from liability by virtue of the association's status as an export trade association registered with the Federal Trade Commission pursuant to the Webb-Pomerene Act. Under that Act, "an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" enjoys immunity from the antitrust laws with respect to any "agreement made or act done in the course of export trade." 15 USC § 62 (1988).

IRM's position in the case is that the association has forfeited that immunity because it has (1) included foreign-owned corporations as members; (2) conspired with non-exempt foreign soda ash producers to depress competition in the soda ash industry; and (3) pursued purposes other than the export trade by entering into a terminalling agreement with one of IRM's rival terminal operators. In addition, IRM contends that summary judgment was inappropriate because the novel questions of law presented by this case should not have been decided without the benefit of a fully developed factual record.

We conclude that immunity under the Act is not limited to associations composed solely of American-owned firms; that IRM lacks standing to argue that the association has forfeited the exemption by depressing competition in the market for soda ash; and that the association did not forfeit its right to the exemption by entering into the terminalling agreement. We also conclude that further factual development is not necessary to decide the questions of law presented, although they are admittedly both novel and complex. Accordingly, we will affirm the district court's grant of summary judgment for defendants.

I. FACTS

IRM operates a terminal in Port Longview, Washington, where it loads dry white bulk product, primarily soda ash,[1] onto ocean-going vessels. Formed in 1983, the American National

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1. Soda ash, the common name for anhydrous sodium carbonate, is primarily used in making glass.

Soda Ash Corporation ("ANSAC") is an association of soda ash producers organized pursuant to the Webb-Pomerene Act. Although all of its members are United States corporations whose principal places of business are in the United States, all but one is partly or wholly owned by, or affiliated with, a major foreign corporation.[2]

Prior to ANSAC's formation, each soda ash producer bargained separately for terminal services. Once ANSAC was formed, however, each member ceased individual bargaining and instead authorized ANSAC to negotiate a common rate on behalf of them all.[3] IRM bargained for rates under both regimes.

Other terminal operators also bargained for rates with ANSAC. In early 1984, Hall-Buck Marine, Inc. ("Hall-Buck" or "HBM"), a terminal operator in competition with IRM, proposed an arrangement whereby ANSAC would guarantee to ship 400,000 metric tons of soda ash each year for five years, in

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2. As the district court explained:

> (1) Defendant Stauffer Chemical Company is wholly owned by the French corporation, Rhone Poulenc Chemie S.A., the third largest producer of soda ash in the world. (2) Defendant TG Soda Ash is wholly owned by the French chemical conglomerate, Societe Nationale Elf Aquitaine, a major manufacturer of caustic soda (a soda ash substitute). (3) Defendant Chemical General Partners is forty-nine percent owned by Australian Consolidated Industries, a major reseller of soda ash. (4) Defendant Tenneco Minerals has entered into a joint venture with Japanese-owned ASAHI Glass, the largest Japanese producer of soda ash, to exploit Tenneco Minerals' soda ash reserves. (5) Defendant Kerr-McGee recently sold its soda ash reserves to North American Chemical Company, which is thirty-percent owned by the largest Korean producer of soda ash, Oriental Chemical Industries. (6) Only defendant FMC Wyoming Corporation is not linked to a foreign enterprise significantly engaged in the production or sale of soda ash or caustic soda.

International Raw Materials, Ltd. v Stauffer Chemical Co., 767 F Supp 687, 688 (ED Pa 1991) ("*IRM III*").

3. For example, in September 1984, the owner of General Chemical Partners informed IRM that, beginning November 1, 1984, all negotiations for terminalling would have to be pursued through ANSAC. Shortly thereafter, the other soda ash producers followed suit, and those who then had contracts with IRM assigned them to ANSAC.

return for which ANSAC would receive lower rates and would share in revenues for all soda ash cargoes shipped by other firms. ANSAC did not accept Hall-Buck's proposal.

In September 1985, ANSAC entered into a three-year agreement with IRM in which ANSAC agreed to use IRM's Longview facility to load at least 66 percent of ANSAC's West Coast exports. At $3.72 to $4.72 per metric ton, the collective rates ANSAC and IRM agreed to were significantly lower than the range of rates IRM had negotiated with the individual producers between 1982 and 1984.[4]

As their agreement neared expiration, ANSAC and IRM resumed negotiations. Although IRM offered ANSAC a flat rate of $3.72 per metric ton, ANSAC took its business to Hall-Buck, which had signed a lease with the Port of Portland, Oregon and planned to construct a new terminal there. On October 30, 1987, ANSAC and Hall-Buck entered into a Terminalling Agreement in which Hall-Buck promised ANSAC rates substantially lower than those ANSAC had previously negotiated with IRM.[5] In return, ANSAC promised to ship at least 500,000 metric tons of soda ash through Hall-Buck's Portland terminal each year, unless Hall-Buck obtained more than 250,000 tons of business from customers other than ANSAC, in which case ANSAC's annual commitment would be reduced to 425,000 tons.

The ANSAC/Hall-Buck agreement provides for a term of five years, with two five-year options to renew. More specifically, the Agreement entitles ANSAC to renew on the same terms at the end of the first five years. If ANSAC exercises its option to renew, the Agreement also entitles it to renew on the same terms at the end of the next five years. If ANSAC chooses not to renew at the end of the first five years, the Agreement requires ANSAC to pay Hall-Buck half of the estimated unamortized cost of constructing the terminal within thirty days after the end of the five-year term. Payment of this amount gives ANSAC "the right to require" a 50 percent ownership interest in the

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4. These rates ranged from $5.65 to $8.46 per metric ton, depending on tonnage.

5. In contrast to the flat rate of $3.72 per metric ton offered by IRM, ANSAC and Hall-Buck agreed to a rate of $3.60 per metric ton up to 500,000 tons and $2.60 per metric ton over that amount.

terminal.[6] The Agreement further provides:

> In such event, Hall-Buck shall be given a contract to operate the Terminal for the duration of the lease on a basis to be negotiated between both parties. Parties agree that such 50 percent ownership interest by ANSAC is not intended to put ANSAC in the Terminalling business, but is rather intended to confer on ANSAC an appropriate equity interest in compensation for its contribution to the cost of the investment and that ANSAC shall have the right to sell, assign, or otherwise dispose of such ownership, provided however that Hall-Buck shall have the right of first refusal should ANSAC decide to sell its ownership interest.

IRM III, 767 F Supp at 690.

II. PROCEDURAL HISTORY

IRM filed this suit on November 23, 1987, less than one month after it lost ANSAC's business to Hall-Buck. IRM's initial complaint alleged that ANSAC and its members conspired to fix the rates of domestic terminalling services for soda ash in violation of section 1 of the Sherman Act, 15 USC §§1-7 (1988). On January 11, 1989, defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6), claiming that, as a matter of law, their status as a Webb-Pomerene association exempted them from antitrust liability.

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6. The Agreement provides:

> The estimated cost of construction of the Terminal is $4,300,000. On the basis of this estimate, and an assumption that the investment cost will be amortized over fifteen (15) years, at the end of the initial five-year term of this Agreement, there will be an unamortized cost of $2,866,667. In the event that ANSAC does not renew the contract after the initial five-year term, ANSAC shall pay to Hall-Buck $1,433,333 within thirty (30) days after completion of five years of operation, regardless of the actual investment cost and unamortized cost. ANSAC shall have the option, exercisable by written notice to Hall-Buck, to require that an economic arrangement be entered into between ANSAC and Hall-Buck providing for ANSAC's ownership, in consideration for making the above referenced payment, of 50% of the Terminal.

IRM III, 767 F Supp at 690.

In response, IRM argued that ANSAC does not qualify for Webb-Pomerene status because (1) many ANSAC members are owned by foreign corporations and (2) further discovery might reveal that, through its relationship with Hall-Buck, ANSAC was actively engaging in the terminalling business, thereby violating the "sole purpose" provision of the Act, which restricts the exemption to export-related activity. See 15 USC §62.

Because the district court considered the affidavits supporting the defendants' 12(b)(6) motion, it treated that motion as one for summary judgment under Federal Rule of Civil Procedure 56. *International Raw Materials, Ltd. v Stauffer Chemical Co.*, 716 F Supp 188, 190 (ED Pa 1989) ("*IRM I*"), vacated, 898 F2d 946 (3d Cir 1990) ("*IRM II*"). Concluding that ANSAC's practices "fall squarely within" the Webb-Pomerene exemption, 716 F Supp at 191, the court granted summary judgment for the defendants. IRM appealed.

Although IRM had argued before the district court that ANSAC's relationship with Hall-Buck was such that ANSAC was no longer entitled to immunity under the Webb-Pomerene Act, little, if any discovery, had been conducted on the facts of that relationship. We held that it was necessary to develop a more complete factual record before we could determine the applicability of the Webb-Pomerene exemption. See 898 F2d at 949-50. Accordingly, we vacated the grant of summary judgment and remanded to the district court for further fact finding.

On remand, the district court limited discovery to the issue of the relationship between ANSAC and Hall-Buck.[7] Upon completion of discovery as to that issue, the parties renewed their cross-motions for summary judgment. While those motions were pending, IRM amended its complaint to add six foreign corporations and Hall-Buck as alleged co-conspirators with ANSAC and its members. The amended complaint also added a second count, alleging that ANSAC's relationship with Hall-Buck violated section 1 of the Sherman Act by restraining trade and depressing competition in the business of terminal services.

Before the district court's disposition of the pending motions, IRM also moved to lift the limitation on further discovery.

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7. The case was reassigned to a different district judge, the judge originally assigned to the case having become ill.

In an order accompanying its opinion on the summary judgment motions, the district court denied the motion for additional discovery because "no further discovery is necessary to effect a disposition of this case—all facts pertinent to ANSAC's Webb-Pomerene defense having been formally discovered or independently marshalled by IRM." *IRM III*, 767 F Supp at 689-90 n5.

IRM opposed ANSAC's motion for summary judgment on the same two grounds it had raised before. However, the district court rejected both challenges, reasoning that (1) neither the plain language of the statute nor its legislative history prevent foreign-owned firms from participating in Webb-Pomerene associations and (2) ANSAC's relationship with Hall-Buck did not put ANSAC into the terminalling business.

This appeal followed. We have appellate jurisdiction pursuant to 28 USC §1291.[8] Our review of an order granting summary judgment is plenary, *Desvi, Inc. v Continental Ins. Co.*, 968 F2d 307, 308 (3d Cir 1992), and we view the facts in the light most favorable to IRM, the party opposing summary judgment, *Erie Telecommunications, Inc. v Erie*, 853 F2d 1084, 1093 (3d Cir 1988).

III. DISCUSSION

A. *The Webb-Pomerene Act—General Background*

In 1916, the Federal Trade Commission submitted to Congress an exhaustive study of the United States export trade. See generally Federal Trade Commission, *Report on Cooperation in American Export Trade* (1916). In that study, the Commission expressed concern that United States exporters, particularly small manufacturers and producers, were at a disadvantage vis-a-vis foreign cartels. Id. at 6. Consequently, the Commission recommended that United States firms be permitted to form their own export cartels free of the strictures of the Sherman Act. Id at 3.

In 1918, Congress passed the Webb-Pomerene Act, thereby creating an exemption to the Sherman Act for all cartels or

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8. The district court had subject matter jurisdiction pursuant to 28 USC §§1331 & 1337(a).

combinations engaged solely in export trade. Congress enacted Webb-Pomerene because it agreed with the Commission's proposed solution to the perceived problems facing United States exporters. See *United States v Concentrated Phosphate Export Ass'n*, 393 US 199, 206, 89 S Ct 361, 365-66 (1968) ("*Concentrated Phosphate*") ("Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels"). See also Note, *The Webb-Pomerene Act: A Reexamination of Export Cartels in World Trade*, 19 Va J Intl L 151, 156 (1978) (Congress "sought to enable American exporters to compete effectively with the bargaining strength of foreign cartels" by allowing American firms to join forces). Proponents of the FTC's position envisioned several ways in which allowing United States exporters to collude would help them to compete with foreign suppliers. For example, Representative Webb noted that firms could reduce marketing costs by creating joint selling agencies. 55 Cong Rec 3576 (1917).

At the same time that Congress wanted to encourage exports, however, it also wanted to ensure that gains in export trade did not come at the expense of the American consumer. Congress "thought it could increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers." *Concentrated Phosphate*, 393 US at 208, 89 S Ct at 366. Congress therefore hedged the exemption with a number of provisos intended to preserve competition in the domestic market. 393 US at 206-07, 89 S Ct at 366.

The statute's language reflects Congress's dual (and arguably contradictory) goals. Specifically, the Webb-Pomerene Act provides:

> Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export

> trade of any domestic competitor of such association: *Provided*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

15 USC § 62 (1988) (emphasis in original). In sum, the Act permits Webb-Pomerene associations to form export cartels without fear of suit under the Sherman Act, provided that they do not restrain domestic trade in the good or product they export, or hinder the export trade of domestic competitors that are not members of the association. See Wilbur L. Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 Vand J Trans L 673, 677 (1982).

B. *The Effect of Foreign Ownership on an Association's Immunity Under the Webb-Pomerene Act*

1. *Statutory Construction*

Nothing in the language of the statute or its legislative history explicitly restricts membership in Webb-Pomerene associations to American-owned firms. Indeed, the House of Representatives considered and rejected statutory language to that effect. During the debate in the House, Representative Dillon proposed amending the bill to read "associations formed under the terms of this act shall be composed solely of citizens or corporations of the United States." During the discussion of the proposed amendment, Representative Bennett suggested limiting the Act's immunity to corporations that had at least 60 percent American ownership. Cong Rec 13730-31 (1916). Neither the amendment nor the suggestion was adopted. Id at 13731.

IRM argues that we should disregard the rejection of these efforts to limit Webb-Pomerene associations to American-owned firms because Representative Dillon was an opponent of the Act who offered his amendment at the eleventh hour. IRM fur-

ther observes that the amendment received little debate, and was rejected because some were concerned that it would prevent the associations from employing a foreign selling agent, and others thought that it was poorly drafted. IRM may well be correct in its analysis of the circumstances surrounding the amendment and the reasons for its rejection. Nevertheless, the fact remains that nothing in the statute's language prevents United States subsidiaries of foreign corporations from participating in a Webb-Pomerene association.

IRM also argues that the amendment was rejected because Congress thought that a prohibition against foreign ownership was already contained in the act. In support of this argument, IRM cites to the following statement made by Senator Pomerene approximately a year after the proposed amendment:

> On the second page of the bill the committee defines the associations which may have the privileges of the bill as meaning "any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations." I think the language is so explicit that whatever organization is formed will be so subject to the laws of the land that it would be impossible for foreigners to engage in this business and continue the association in violation of the laws of the United States.
>
> But I want to suggest, for the consideration of Senators at this time, that if they have any doubt about this language it could be amended by providing that these associations would be composed only of two or more persons, partnerships, or corporations who are resident in or situate within the United States. Such an amendment would prevent absolutely any foreign corporation or cartel from becoming interested in the association. I do not believe it is necessary, but it may be that it would be a wise additional safeguard.

56 Cong Rec 169 (1917).

IRM interprets Senator Pomerene's statement to mean that a prohibition against foreign firms was already "so explicit" in the bill as drafted. In response, ANSAC points out that, in the

quoted passages, Senator Pomerene was discussing the bill's provisos against injury to domestic trade. In ANSAC's view, Senator Pomerene was simply stating that in his opinion, the bill already contained adequate safeguards against unlawful foreign influences that might cause such an injury.

We agree. We do not read Senator Pomerene's statement as evidence of congressional intent to limit membership in Webb-Pomerene associations to American-owned firms. First, his statement was made in response to another concern—he was replying to critics of the bill who feared its effects on the domestic market and on the export trade of domestic competitors of the associations. 56 Cong Rec at 169. Immediately before he made the statement quoted above, he stressed that the bill's immunity extended only to "trade or commerce . . . exported or in the course of being exported from the United States . . . to any foreign nation," id, thereby underscoring that the immunity did not extend to trade within the United States. Then, after stating that "it would be impossible for foreigners to engage in this business *and* continue the association in violation of the laws of the United States," id (emphasis added), he emphasized that the bill contained provisos against injury to the domestic market and to the export trade of domestic competitors. Accordingly, we interpret his statement as an effort to reassure opponents that foreign firms could not use the bill's immunity to do damage to the domestic market or to the export trade of domestic competitors, rather than as a prohibition against permitting foreign-owned firms to participate in the associations.

In addition, we note that the change Senator Pomerene suggested would not have prohibited foreign-owned firms from joining Webb-Pomerene associations. Rather than proposing an amendment limiting membership to American-owned firms, Senator Pomerene instead suggested changing the language to read "these associations would be composed only of two or more persons, partnerships, or corporations *who are resident in or situate within the United States*," id (emphasis added). This suggested language says nothing about the *ownership* of the association's members. Moreover, the suggested language is consistent with our interpretation of the motivation behind

Senator Pomerene's statement. Because firms that are resident or situated in the United States export *from* the United States *to* a foreign nation, limiting membership to such firms is another way of saying that the immunity extends only to the export trade.

Having determined that neither the statute nor the legislative history specifically resolves the question of whether membership in a Webb-Pomerene association is limited to American-owned firms, we consider whether permitting foreign-owned firms that export goods from the United States to participate in such associations is inconsistent with the purpose of the Act.

As we have noted, "[t]he Webb-Pomerene Act was passed to allow United States companies exporting United States products to compete more effectively in the world market." *IRM III*, 898 F2d at 947, citing HR Rep No. 1056, 64th Cong, 2d Sess 1-2 (1917); S Rep No. 1118, 64th Cong, 1st Sess 1 (1916). In other words, the purpose of the Act is to increase exports from the United States. Permitting foreign-owned firms that produce goods in the United States for export to other countries to participate in Webb-Pomerene associations does not militate against this purpose.

IRM submits that because Congress intended the increase in exports to inure to the benefit of "American interests," only American-owned firms should be permitted to claim the Act's protections. While it could be argued that Congress intended the Act to protect only those firms that are American-owned or -controlled, we are reluctant to read such a requirement into the statute, especially when, as Judge Pollak observed, foreign ownership is not necessarily at odds with an intent to benefit American interests. See *IRM II*, 767 F Supp at 692. Foreign-owned firms that produce goods in the United States for export to other countries employ American workers, purchase American services and raw materials, and pay American taxes.

Congress may not have had these particular benefits in mind when it passed the Webb-Pomerene Act. But where, as here, an argument can be made that allowing foreign-owned firms to claim the exemption is consistent with the purpose of the Act, and where Congress did consider excluding such firms,

but chose not to, we will not read into the Act an intention to limit participation to American-owned firms.[9]

2. *Case Law*

This is the first reported case in which the Webb-Pomerene Act has been asserted as a defense to a private civil suit. Prior cases consist of government enforcement actions against Webb-Pomerene associations. IRM looks to the case law to support its argument that foreign ownership is inconsistent with the purpose of the Act. However, none of the cases addressed the question presented here—whether the Act applies

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9. We note that the FTC has indicated the view that, in its opinion, foreign ownership or control of an association member does not abrogate the immunity conferred by the Act. An inquiry submitted to the FTC in 1973 asked:

> Is it a violation of the antitrust laws of the United States for an export association to include as a member of that association a corporation, incorporated in one of the States of the United States, which is owned or otherwise controlled by foreign interests?

83 FTC 1940 (1973).

In an advisory opinion, the Commission responded:

> The Commission is of the opinion that membership in an export (Webb-Pomerene) association by a United States corporation, which is owned or controlled by foreign interests, in and of itself, would not violate the laws administered by the Commission.

Id.

Because the FTC's interpretation of the Act in its 1973 advisory opinion is in accord with our construction of the statute, we need not decide whether *Chevron U.S.A.., Inc. v Natural Resources Defense Council, Inc.*, 467 US 837, 104 S Ct 2778 (1984), which requires judicial deference to an agency's legislative rules, overruled *General Elec. Co. v Gilbert*, 429 US 125, 141-42, 97 S Ct 401, 410-11 (1976), which held that an agency's interpretive decisions demanded less judicial deference. Although the D.C. Circuit has held that an agency's interpretive decisions should receive *Chevron* deference, see *Wagner Seed Co. v Bush*, 946 F2d 918, 922 (DC Cir 1991), cert. denied, 112 S Ct 1584 (1992), this and other courts have not yet decided the issue. See, for example, *Griffon v United States Dep't of Health & Human Servs.*, 802 F2d 146, 148 n3 (5th Cir 1986) (leaving unresolved whether *Chevron* applies to interpretive rules). See also Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum L Rev 2071, 2093-94 (1990) (*Chevron* deference should apply only to agency's statutory interpretations pursuant to legislative rulemaking authority).

to foreign-owned firms that produce goods in the United States for export to other countries. Although they are therefore inapposite, we review them briefly because they are all that is out there with respect to this almost three-quarter-century-old law.

In *In re Phosphate Export Ass'n*, 42 FTC 555 (1946), the FTC prohibited a foreign-owned corporation from participating in a Webb-Pomerene association. The Commission held that "[i]t was not consistent with the terms and purposes of the Webb-Pomerene Act for [an association] to accept as a member the subsidiary of a foreign *purchaser or customer*" of the association's product, id at 843-44 (emphasis added). The Commission's decision did not, however, depend upon the fact that the subsidiary was owned by a foreign parent; instead, the Commission observed that the subsidiary "was never itself a producer of [the product] . . . [nor] actually engaged in the exportation of [the product] from this country." Id. Because the subsidiary's "participation . . . was an activity in the course of export trade into Europe rather than in the course of export trade from the United States," id, its activities did not fall within the scope of the Act as defined by the plain language of the statute. See 15 USC § 61 (defining "export trade" as "trade or commerce in goods . . . exported . . . from the United States").

Another case cited by IRM, *United States v Minnesota Mining & Mfg. Co.*, 92 F Supp 947 (D Mass 1950), was decided on similar grounds. In that case, a Webb-Pomerene association composed of firms that manufactured coated abrasives in the United States formed jointly-owned foreign subsidiaries to manufacture the same products abroad. They agreed not to export their American-made products, but instead to supply foreign markets with goods produced by their foreign subsidiaries. The court held that the immunity conferred by the Webb-Pomerene Act did not apply to that agreement. By agreeing to supply foreign markets with goods produced abroad, the association increased "the exclusively internal trade of a foreign country." Id at 963. Because the "statute is by its first section limited to that sort of 'export trade' which consists of 'commerce in goods . . . exported . . . from the United States . . . to any foreign nation,'" id at 963, the immunity conferred by the Act did not apply to the agreement. See also *In re General Milk Co.*, 44 FTC 1355, 1411 (1947) (immunity does not cover member's

foreign subsidiaries that are not engaged in exporting product from the United States).

In sum, these cases stand for the proposition that Webb-Pomerene immunity is limited to the business of exporting goods from the United States. Because foreign corporations that do not produce goods in the United States do not engage in that business, *Phosphate* held that they may not be included as members of Webb-Pomerene associations. Correlatively, *Minnesota Mining* held that a Webb-Pomerene association's immunity does not extend to production abroad by subsidiaries of the association's members because such production is not part of the business of exporting goods from the United States. This case is distinguishable from *Phosphate* and *Minnesota Mining* because all of ANSAC's members produce goods for export from the United States and thus all engage in "export trade" as it is defined by the statute.

B. The Alleged Conspiracy with Non-immune Parties

IRM also argues that ANSAC has forfeited its immunity under the Webb-Pomerene Act by conspiring with the foreign parent corporations of its members. This argument is grounded on *United States v United States Alkali Export Ass'n*, 86 F Supp 59 (SDNY 1949) (*"Alkali"*), which prohibited Webb-Pomerene associations from conspiring with foreign producers of the same product. There, two Webb-Pomerene associations that were formed for the purpose of selling their members' products abroad entered into agreements with firms that produced the same products in other countries. Under those agreements, the associations agreed to divide the worldwide market into territories (some exclusive and some joint), establish sales quotas, and fix prices in foreign markets. The court rejected the associations' Webb-Pomerene defense because it reasoned that agreements to cartelize the international market necessarily restrain the export trade of domestic competitors, thereby violating the statute's provisos. Id at 67.

IRM argues that *Alkali* is on point because ANSAC's foreign-owned members are, in effect, controlled by foreign producers of soda ash. According to IRM, the foreign soda ash producers are using their subsidiaries as front companies

through which to achieve the very type of international cartelization prohibited in *Alkali*. We are unpersuaded.

Even if we adopt IRM's allegations as true, the harm to domestic competition caused by international cartelization of the soda ash industry is irrelevant to IRM's suit. Such harm falls on producers or purchasers *of soda ash*. In contrast, IRM is a terminal operator, and the harm its suit alleges is that ANSAC has depressed competition in the market for terminalling services. If IRM had alleged that it purchases or sells soda ash, it would have standing to assert a claim that it has been injured by ANSAC's alleged restraint of trade in the soda ash market.[10] See generally *Associated Gen. Contractors, Inc. v California State Council of Carpenters*, 459 US 519, 539, 103 S Ct 897, 909 (1983). Although IRM has asserted that ANSAC's activities have decreased competition in the terminalling market, it has simply offered no basis for this assertion. Given that IRM has failed to develop a claim that ANSAC's alleged restraint of trade in the soda ash market has resulted in decreased competition in the terminalling market, we hold that it may not rely on ANSAC's alleged unlawful conduct in the soda ash market as the basis for its challenge to ANSAC's immunity for activities in the terminalling market.[11]

It is well established that, notwithstanding the broad liter-

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10. In a footnote to its opening brief before this court, IRM asserts that the district court "mistakenly assume[d] that IRM was not also a soda ash reseller that competed with ANSAC," and cites to an affidavit stating that a company affiliated with IRM, Pacific International Raw Materials, Ltd., distributes bulk chemicals, including soda ash, in New Zealand. But this does not suffice. More importantly, IRM's complaint does not allege that IRM is a consumer or producer of soda ash.

11. In a footnote to its reply brief, IRM raises a separate conspiracy theory. It notes that Count II of its amended complaint includes an allegation that ANSAC and its members have conspired to boycott IRM's terminal both in the case of ANSAC shipments and of non-ANSAC shipments made by the individual members. Unlike the soda ash market conspiracy theory discussed in the text, this alleged conspiracy is not between immune and non-immune parties. Rather, it involves parties who are immune, but *acts*—non-ANSAC shipments—that are not. Moreover, and in further contrast to the alleged soda ash conspiracy, this alleged conspiracy constitutes IRM's cause of action.

We need not decide the merits of this second conspiracy theory, however. IRM did not include the theory in its Statement of Issues presented for review

al language of the Sherman Act, Congress did not intend to allow everyone affected by an antitrust infraction to bring suit. See, for example, *Associated Gen. Contractors*, 459 US at 529-536, 103 S Ct at 903-907; *Blue Shield of Va. v McCready*, 457 US 465, 477, 102 S Ct 2540, 2547 (1982) ("Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action for threefold damages"). The Court has imposed limitations on who may sue under the antitrust laws. Under the rule of *Brunswick Corp v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 97 S Ct 690 (1977), a plaintiff must demonstrate that it has suffered antitrust injury in order to sue under the antitrust laws.[12] *Brunswick* holds that to establish antitrust injury, plaintiffs must prove (1) "injury of

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on appeal, and did not mention it in its opening brief before the court. We have repeatedly emphasized that failure to raise a theory as an issue on appeal constitutes a waiver because "consideration of that theory would vitiate the requirement of the Federal Rules of Appellate Procedure and our own local rules that, absent extraordinary circumstances, briefs must contain statements of all issues presented for appeal, together with supporting arguments and citations." *Simmons v Philadelphia*, 947 F2d 1042, 1065 (3d Cir 1991), cert. denied, 112 S Ct 1671 (1992). Accord *Brenner v United Brotherhood of Carpenters and Joiners of America*, 927 F2d 1283, 1298 (3d Cir 1991). By raising the theory for the first time on appeal in its reply brief, IRM has foreclosed our consideration of this issue and has waived reliance on the theory. See *Hoxworth v Blinder, Robinson & Co.*, 903 F2d 186, 205 n29 (3d Cir 1990) ("As a general matter, the courts of appeal will not consider arguments raised on appeal for the first time in a reply brief").

12. Although this court has articulated some distinction between the concepts of standing and antitrust injury, see, for example, *Alberta Gas Chemicals, Ltd. v E.I. Du Pont De Nemours*, 826 F2d 1235, 1240 (3d Cir 1987) ("Once antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, standing analysis is employed to search for the most effective plaintiff from among those who have suffered loss"), it has acknowledged that "in the sense that plaintiffs who sustain no antitrust injury may not recover, they may be loosely said to lack standing." Id. In *Associated Gen. Contractors*, the Supreme Court collapsed the two issues into one broad inquiry. See *Associated Gen. Contractors*, 459 US at 535-544, 103 S Ct at 907-911. In this opinion, we refer to standing and antitrust injury interchangeably because, as Professors Areeda and Hovenkamp have explained, the "characterizations are largely immaterial" because the concepts are functionally equivalent. Phillip E. Areeda & Herbert Hovenkamp, 1 Antitrust Law ¶ 334.3 at 377 (1991 Supp).

the type the antitrust laws were intended to prevent," id at 489, 97 S Ct at 697, and (2) injury that "flows from that which makes the defendants' acts unlawful," id at 489, 97 S Ct at 697.

In *Brunswick* itself, and typically in decisions in which antitrust injury was founding lacking, the plaintiffs failed to satisfy the first prong of *Brunswick*'s test because they were injured by acts that were actually procompetitive. See id at 487, 97 S Ct at 697; *Cargill Inc. v Monfort of Colo., Inc.*, 479 US 104, 115-17, 107 S Ct 484, 492-93 (1986); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F2d 205, 211 (3d Cir 1980). In contrast, IRM has satisfied *Brunswick*'s first requirement. Its allegation of decreased competition in the terminalling market *is* the type of harm targeted by the antitrust laws.

Brunswick's second prong is where IRM falters. IRM bases its claim upon the alleged cartelization of the international soda ash market, even though it is not a participant in this market. Because IRM is neither a competitor nor a consumer in the relevant market, it must allege a significant causal connection between the alleged soda ash conspiracy and the alleged anticompetitive effects in the terminalling market such that the harm to the terminalling market can be said to be "inextricably intertwined" with the alleged soda ash cartel. *McCready*, 457 US at 484, 102 S Ct. at 2551. See also *Associated Gen. Contractors*, 459 US at 538, 103 S Ct at 908 (recognizing the Sherman Act's "central interest in protecting the economic freedom of participants in the relevant market"); *Gregory Marketing Corp. v Wakefern Food Corp.*, 787 F2d 92, 95 (3d Cir. 1986) (denying standing to party who was neither competitor nor consumer in relevant market).

IRM, however, has merely alleged that ANSAC has colluded to control the international soda ash market without attempting to forge any link to the competitiveness of the domestic terminalling market.[13] Because IRM has not shown how the decreased competition in the terminalling market of which it

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13. In fact, despite the ruling of the district court that IRM lacked standing, see *IRM III*, 767 F Supp 693 n14, on appeal IRM has not presented an argument that it does have standing to raise this claim. Instead, IRM has merely offered an unsupported assertion that ANSAC's actions in the international soda ash market have reduced competition in the terminalling market.

complains "flows from that which makes the defendants' acts unlawful," *Brunswick*, 429 US at 489, 97 S Ct at 697, IRM fails *Brunswick*'s second requirement.

IRM's inability, under *Brunswick*, to challenge ANSAC's alleged antitrust violations in the soda ash market without demonstrating a connection with the terminalling market comports with the sound prudential considerations undergirding antitrust standing doctrine and general standing requirements. See, for example, *Associated Gen. Contractors*, 459 US 542-45, 103 S Ct at 910-12 (recognizing prudential concerns underlying antitrust standing restrictions); *Caplin & Drysdale v United States*, 491 US 617, 623 n3, 109 S Ct 2646, 2651 n3 (1989) (discussing prudential reasons to limit third-party standing). Because IRM is neither a producer nor a consumer of soda ash, it is not the plaintiff best situated to challenge ANSAC's allegedly unlawful conduct in the soda ash market. That is, IRM cannot be depended upon to advance the strongest arguments identifying the anticompetitive effects in the soda ash market, in which it does not participate. In addition, IRM may not be the best advocate for those who *are* participants in the soda ash market, who would be more appropriate plaintiffs. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to serve as private attorney general." *Associated Gen. Contractors*, 459 US at 542, 103 S Ct at 910.

These considerations in turn, underscore another risk created by allowing IRM to challenge ANSAC's alleged soda ash conspiracy. Because the industrial consumers of soda ash, for example, could still bring suit and raise these same claims, permitting IRM to go forward with this claim creates the risk of duplicative recovery. See *Illinois Brick Co. v Illinois*, 431 US 720, 730, 97 S Ct 2061, 2067 (1977). Given that IRM has made no showing of a connection between the alleged international soda ash conspiracy and the level of competition within the termi-

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It is well-established that a party cannot avoid summary judgment based on mere allegations in its pleading. See *Celotex Corp. v Catrett*, 477 US 317, 323, 106 S Ct 2548, 2552-53 (1986). For this reason, as well as those discussed at pages [A27-28], IRM's claim cannot survive a motion for summary judgment.

nalling market, these considerations emphasize why IRM is not a proper party to raise this claim.

In a related vein, although IRM also loosely cites a line of cases prohibiting parties that are exempt from antitrust liability from conspiring with non-exempt parties, those cases do not change our analysis. Of those decisions, IRM primarily relies on *Beltz Travel Serv., Inc. v Int'l Air Transport Ass'n*, 620 F2d 1360 (9th Cir 1980). In *Beltz*, a travel agency and tour operator brought suit against its rival tour operators, two airline trade associations, and the associations' members. The suit alleged that the defendants had conspired to drive plaintiff from the independent tour operator business in violation of section 1 of the Sherman Act. The district court granted summary judgment for the trade associations and one member[14] on the ground that these defendants were immune from antitrust liability under the Federal Aviation Act of 1958, 49 USC § 1382. The Ninth Circuit reversed, holding that the trade associations and their members had lost their statutory immunity by allegedly conspiring with the non-immune tour operators.

IRM also cites *Group Life & Health Ins. Co. v Royal Drug Co.*, 440 US 205, 231, 99 SCt 1067, 1093 (1979), in which independent pharmacists brought an antitrust action against an insurance company and three pharmacies. The plaintiffs alleged that the defendants had entered into agreements to fix the price of drugs and participated in an unlawful boycott of the plaintiffs's businesses. The Court held that the defendants' actions were not exempt from antitrust liability under the McCarran-Ferguson Act, 15 USC § 1012(b) (1988), because they did not constitute the "business of insurance" as required by the statute. These agreements constituted only the "business of the insurers"—agreements intended to enable the insurance company to cut costs—and did not involve the contractual relationship between the insurer and the insured. In denying the antitrust exemption under McCarran-Ferguson, the Court acknowledged that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 US at 231, 99 S Ct at 1093.

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14. Process had not been served on the other members.

However, the rule against conspiracies between immune and non-immune parties stated in *Beltz*, *Group Life*, and similar cases does not apply here. In those cases, the alleged conspiracy between the immune and non-immune parties formed the basis of plaintiff's cause of action. IRM's cause of action is based on an entirely different theory, however. As we have already observed, see note 10 and accompanying text, IRM seeks to recover for damages caused by an alleged conspiracy to suppress competition in the market for terminalling services, rather than for damages caused by an alleged conspiracy to suppress competition in the soda ash market. We hold that where, as here, the alleged conspiracy between immune and non-immune parties is unrelated to the plaintiff's cause of action, the plaintiff has no standing to challenge the defendant's immunity on the basis of the alleged conspiracy.

Moreover, even if we could prove that ANSAC had violated the Act's provisos by conspiring with non-immune parties to depress competition in the market for soda ash, ANSAC would still be entitled to claim immunity regarding the alleged acts and agreements—relating to terminalling services—that form the basis of IRM's cause of action, for those acts and agreements fall within the scope of the Act. If ANSAC's members have conspired with their foreign parents to cartelize the international soda ash market (a matter on which we express no opinion), then they have violated the Act's provisos because such activity necessarily injures domestic consumers and competitors. In such a case, however, the proper response would be to redress the injuries to those domestic consumers and competitors, rather than to hold that by causing such injuries, ANSAC had forfeited its right to engage in other activities that do not violate the Act's provisos.

The Act expressly contemplates that an association that engages in activities outside the scope of the immunity conferred by the Act will be permitted to retain its immunity for activities that do fall within the Act's scope. Specifically, section 5 of the Act, which authorizes the Federal Trade Commission to investigate as associations believed to have violated the Act's provisos, provides that "[u]pon investigation, if [the Commission] shall conclude that the law has been violated, it may

make to such association recommendations for the readjustment of its business, *in order that it may thereafter maintain its organization and management and conduct its business in accordance with law.*" 15 USC § 65 (emphasis added). Accordingly, although Webb-Pomerene associations that have engaged in activities that fall outside of the immunity conferred by the Act have been held liable for those activities, they have also been permitted to continue activities that do fall within the scope of the Act. See, for example, *Minnesota Mining*, 92 F Supp at 966 (enjoining association from implementing parts of agreement that exceed scope of Act, but refusing to invalidate entire agreement and declining to dissolve association). See also *In re Phosphate Export Ass'n*, 42 FTC 555 (1946) (recommending that association withdraw from agreements that violate Act's provisos, but allowing association to continue lawful activities); *In re Florida Hard Rock Phosphate Export Ass'n*, 40 FTC 843 (1945) (same).

In sum, we conclude that IRM may not base its challenge to ANSAC's Webb-Pomerene defense on the alleged conspiracy between ANSAC's members and their foreign parent corporations.

B. *The Terminalling Agreement*

IRM argues that ANSAC's relationship with Hall-Buck effectively puts ANSAC into the terminalling business, thereby violating the Act's sole purpose provision, which conditions immunity on the requirement that an association pursue the sole purpose of engaging in export trade. IRM contends that ANSAC is participating in the terminalling business because it profits from shipments made by Hall-Buck's other customers.

In 1984, several years before ANSAC and Hall-Buck entered into the Terminalling Agreement, Hall-Buck proposed an arrangement whereby ANSAC would guarantee to ship 400,00 metric tons of soda ash annually for five years, in return for which ANSAC would receive lower rates and would share in revenues for all soda ash cargoes shipped by other firms. IRM contends that, while the Agreement ANSAC ultimately entered into with Hall-Buck does not expressly provide for such revenue sharing, it has the same effect. In IRM's view, the Terminalling Agreement rolls these revenues into the initial rate, rather

than giving ANSAC a direct rate based on revenues. Thus, IRM submits that ANSAC profits from these other shipments because the rates Hall-Buck charges its other customers subsidize the low rates it charges ANSAC.

To this end, IRM relies on the affidavit of its expert, Herbert R. Northrup, Professor Emeritus of Management at the Wharton School of the University of Pennsylvania, and on various documents which suggest that the low rates Hall-Buck agreed to charge ANSAC were the result of the higher rates charged to others. In his affidavit, Professor Northrup concludes:

> Based upon my review of the documents . . . I can state categorically that:
>
> (a) ANSAC has an economic interest in the Port of Portland terminal;
>
> (b) An agreement now exists whereby ANSAC is presently profiting from terminalling export products other than soda ash;
>
> (c) An agreement is already in place for ANSAC to profit from terminalling export products at the [Hall-Buck] terminal in the future.

Professor Northrup uses the term "economic interest" to mean "a relationship comparable to that of a joint venturer or partner in a partnership." He reasons that ANSAC's economic interest is evidenced by its commitment to pay the unamortized construction costs in the event of non-renewal and by ANSAC's "dual role as facilitator of the terminal's construction and benefactor of its operation. Because of its economic interest in the bulk outloading terminal, ANSAC is in fact participating in the business of terminalling not only soda ash, but also other products. . . ." In addition, he maintains that the long-term debt commitment to which ANSAC is obligated is a liability that generates a future obligation. Thus, ANSAC has an ownership interest in the terminal in that it owns an option to purchase a 50 percent interest in the terminal for $1,433,000 and "[a]s owner of an option to acquire an equity stake in the terminal at a known future date, it is inconceivable that ANSAC would be indifferent to the financial and operating conditions of the terminal."

ANSAC responds that the Agreement establishes only that ANSAC is Hall-Buck's customer, and not a participant in the terminalling business. It observes that the rates charged to it are fixed by the Agreement and do not fluctuate depending on the volume of business generated by other customers. Thus, ANSAC notes; Hall-Buck, not ANSAC, bears the risk of profit or loss should the anticipated volume from other customers not arise. It further notes that the Agreement expressly states that ANSAC is an independent contractor whose employees are not controlled by ANSAC, and that ANSAC is not entering the terminalling business by its renewal option. ANSAC also rejects the contention that it has a present ownership interest in the terminal. It points out that before such an interest arises, it must decide not to renew the Agreement and then must elect to require that an economic interest be created. Moreover, ANSAC contends that the option was never intended to put it in the terminalling business. ANSAC explains that Hall-Buck wanted a commitment for more than five years because it had to make a multimillion dollar capital investment in order to provide terminalling services to ANSAC. ANSAC states that it was reluctant to commit to more than five years at the time it signed the Agreement because circumstances, such as a reduced export demand or the dissolution of the association, might make that impossible. According to ANSAC, the commitment to pay half the unamortized construction cost operates as a penalty to compensate Hall-Buck in the event ANSAC does not renew; ANSAC's corresponding right to require the creation of an ownership interest "allow[s] the members to recoup all or some of the penalty for not renewing" by giving them some interest that they can freely sell, assign, or otherwise dispose of.

The district court concluded that "[t]here is no reason to suspect that ANSAC's low rate is anything more than a volume discount, such as would be provided to any large customer. 767 F Supp at 981 n 13. In addition, the court determined that the fact that ANSAC maintains an option, exercisable in the future, does not thereby put ANSAC into the terminalling business. Although ANSAC may have an economic interest in the general operations of the terminal, "all users of [Hall-Buck's] terminal

have an interest in the terminal's overall success and prosperity insofar as their business depends on it." Id at 981-82. Finally, the district court concluded that, although "ANSAC may one day enter a relationship with [Hall-Buck] that would jeopardize its Webb-Pomerene status, that point has not been reached as of yet," and that the indirect economic benefits and potential adverse collateral effects, such as higher rates for other terminal users, "are not a basis for stripping ANSAC of its Webb-Pomerene status." Id at 982-83.

On appeal, IRM argues that it raised a disputed issue of material fact as to whether ANSAC entered into a joint venture with Hall-Buck by demonstrating that: (1) Hall-Buck charges shippers of bentonite and talc rates more than double that which it charges ANSAC; (2) these non-soda-ash revenues subsidize ANSAC's noncompensatory rates; (3) construction of the terminal was contingent upon receiving shipments of products other than soda ash and on ANSAC's $1.43 million guarantee; and (4) ANSAC has a present economic interest in the operations and finances of the terminal as the owner of an option to purchase 50 percent of the terminal.

The district court's determination that the Terminalling Agreement did not take ANSAC outside the scope of Webb-Pomerene immunity required it to construe the contract and the statute. That determination involved a question of law. See *Ram Construction Co. v American States Ins. Co.*, 749 F2d 1049, 1053 (3d Cir 1984) (contract construction, as opposed to contract interpretation, is a question of law). Consequently the district court's determination is subject to plenary review.

It may be that ANSAC receives an "economic benefit" from the rates Hall-Buck charges its other customers. IRM alleges, and ANSAC apparently does not dispute, that the revenues derived from the terminalling of soda ash alone would not have provided an adequate return justifying the terminal's construction. Rather, the operation's profitability was to come from the shipping of bentonite and talc. The issue, however, is not whether ANSAC benefits by the revenues Hall-Buck receives from its other customers. Rather, the issue is whether the relationship between ANSAC and Hall-Buck goes beyond that of a service provider and customer, so as to conclude that ANSAC has

engaged in an endeavor that goes beyond the export of its members' soda ash.

Principles of joint venture or partnership law are relevant to this determination. Courts generally look to four factors to determine whether the parties to an endeavor are joint venturers:

> (1) whether there is an express or implied agreement that demonstrates the parties' intent to form a partnership or joint venture; (2) whether the parties share a common interest in the subject matter of the joint venture; (3) whether the parties share profits and loss from the venture; and (4) whether the parties have joint control or the joint right of control over the venture.

Harry G. Henn & John R. Alexander, *Laws of Corporations* 106 (3d ed 1983). A partnership is essentially the same as a joint venture except that a joint venture usually has a more limited purpose. *In re Groff*, 898 F2d 1475, 1476 (10th Cir 1990).

Even assuming that ANSAC is "sharing" in the revenues from Hall-Buck's other customers in the form of subsidized rates, it is evident that ANSAC has not entered into a risk sharing agreement in relation to the losses or potential losses of the terminal. Without an agreement to apportion losses or potential losses, the relationship does not amount to a joint venture. See, for example, *In re PCH Assoc.*, 949 F2d 585, 601 (2d Cir 1991); *Nelson v Serwold*, 687 F2d 278, 282 (9th Cir 1982). Although the parties may have calculated ANSAC's rates on the assumption that Hall-Buck would make up for the low rates from the higher rates charged for bentonite and talc, the risk that the terminal would not generate this business was borne entirely by Hall-Buck. If that business went elsewhere, Hall-Buck nevertheless remained contractually bound to the rates fixed by the Agreement. ANSAC's rates were subject to escalation only in the event of changes in the consumer price index.

Moreover, ANSAC had no right to control the performance of the business. Although Hall-Buck warranted that the terminal would be operated "in a safe, efficient, and lawful manner, by properly, qualified, careful and efficient workers, in confor-

mity with the best practices of this type of work," and that it could perform under the contract "as expeditiously as practicable" at specified loading rates, Hall-Buck retained "the authority to control and direct the performance of the details of the work."

Lacking any obligation to share in the losses or in the right to control the performance of the terminal, ANSAC was neither a partner nor a joint venturer with Hall-Buck in the terminalling business. Thus, although in an economic sense their relationship may have been "*comparable* to that of a joint venturer or partner," as Professor Northrup states, see page [A-23], in a legal sense such a relationship was not achieved. Moreover, the existence of the 50 percent ownership option does not change this result until that option is exercised. Accordingly, the fact that ANSAC was able to secure favorable rates by what the district court described as nothing "more than a volume discount," 767 F Supp at 981 n 13, did not render its acts or agreements outside the course of export trade.

IV. THE PROPRIETY, OF DISPOSING OF THIS CASE ON SUMMARY JUDGMENT

In *IRM II*, we stated, "This appeal raises complex questions of antitrust law, and a more complete factual record would be helpful to the resolution of some of them." 898 F2d at 949. Specifically, we found it impossible to evaluate the legal effect of the relationship between ANSAC and Hall-Buck without additional facts. Id at 949-50. Accordingly, we remanded the case to the district court with instructions to develop a factual record through discovery. Id. at 950.

As we noted at page [A-6], on remand the district court limited discovery to one issue—the nature of the relationship between ANSAC and Hall-Buck. IRM contends that this limitation contradicts our instructions in *IRM II* and that it is inconsistent with cases in which judgment on novel questions of law has been deferred until the facts could be developed. See 10A Charles A. Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice & Procedure*, § 2725 at 85-89 (2d ed 1983) (citing cases).

The flaw in IRM's argument lies in failing to acknowledge the background rule that only material issues of disputed fact preclude summary judgment. The apparent goal of IRM's proposed discovery program is to prove that ANSAC has violated the Webb-Pomerene Act by restraining trade in the market for soda ash. As we have, explained at pages [A16-19] IRM lacks standing to pursue this argument. Since this is not a case in which further fact finding would aid our decision of the novel questions of law presented, any dispute over ANSAC's effect on the soda ash market is therefore immaterial to the disposition of IRM's suit. Accordingly, we agree with the district court's determination that no further discovery was warranted.

The judgment of the district court will be affirmed.

JUDGMENT OF THE THIRD CIRCUIT IN No. 91-1511

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1511

INTERNATIONAL RAW MATERIALS, LTD.
Appellant

v.

STAUFFER CHEMICAL COMPANY, RHONE POULENC INC., TG SODA ASH, INC., GENERAL CHEMICAL PARTNERS, TENNECO MINERALS CO., FMC WYOMING CORP., KERR-McGEE CHEMICAL CORP. AMERICAN NATURAL SODA ASH CORP.,
Appellees

On Appeal from The United States District Court
Eastern District of Pennsylvania
(D.C. Civ. No. 87-07541)

Present: BECKER, GREENBERG and ALITO
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 13, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 17, 1991, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Sally Mrvos
Clerk

Dated: October 30, 1991
[Filed: October 30, 1991]

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civ. Action No. 87-7541

INTERNATIONAL RAW MATERIALS, INC.
Plaintiff

v.

STAUFFER CHEMICAL COMPANY,
TG SODA ASH, INC.,
GENERAL CHEMICAL PARTNERS,
TENNECO MINERALS COMPANY,
FMC WYOMING CORP.,
KERR-MCGEE CHEMICAL CORP.,
AMERICAN NATURAL SODA ASH CORP.
Defendants

Decided: June 13, 1991.

Entered: June 17, 1991.

MEMORANDUM

POLLAK, J.

Defendants in this antitrust case are the nation's leading producers of soda ash. Together, they comprise the "American Natural Soda Ash Corporation" (ANSAC), an export trade association registered with the Federal Trade Commission (FTC) under the Webb-Pomerene Act, 15 U.S.C. §61 *et seq.* Plaintiff International Raw Materials (IRM) is a Pennsylvania corporation that operates a shipping terminal in Port Longview, Washington, where it loads white dry bulk products, including soda ash, onto ocean-going vessels.

ANSAC and its members have moved for summary judgment against IRM's amended complaint, which asserts two

causes of action under §1 of the Sherman Act,[1] claiming to be exempt from ordinary application of the antitrust laws by virtue of their status as a Webb-Pomerene association. Under the Webb-Pomerene Act, "an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" enjoys immunity from antitrust prosecution with respect to any "agreement made or act done in the course of export trade." 15 U.S.C. §62. IRM denies that ANSAC qualifies for Webb-Pomerene immunity and has cross-moved for summary judgment on the basis of the virtually unrebutted substantive allegations recited in its complaint.

The central question before me, in resolving both motions for summary judgment, is whether ANSAC and its members have asserted a valid Webb-Pomerene defense.

I. Factual and Procedural Background

This case, like an export, comes to me having had a significant history somewhere else. This case was initiated before my colleague Judge Hannum. He, and the Court of Appeals on review of his grant of summary judgment, have both previously summarized relevant issues and facts. See *International Raw Materials v. Stauffer Chemical*, 716 F.Supp. 188, 191 (E.D.Pa. 1989), *vacated and remanded*, 898 F.2d 946 (3d Cir. 1990).

Formed in 1983, ANSAC is an association of American soda ash producers, registered under the Webb-Pomerene Act. All ANSAC members are United States corporations whose principal places of business are in the United States. Yet, with one exception, every member of ANSAC is wholly or partly foreign owned or has major foreign connections: (1) Defendant Stauffer Chemical Company is wholly owned by the French corporation, Rhone Poulenc Chemie S.A., the third largest producer of soda ash in the world. (2) Defendant TG Soda Ash is wholly owned by the French chemical conglomerate, Societe Nationale Elf Aquitaine, a major manufacturer of caustic soda (a soda ash substitute). (3) Defendant General Chemical Part-

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1. Count I alleges that the members of ANSAC are engaged in horizontal price-fixing. Count II alleges that ANSAC's relationship with Hall Buck Marine Inc., the operator of a terminal used by ANSAC, restrains trade and depresses competition in the business of terminal services.

ners is forty-nine percent owned by Australian Consolidated Industries, a major re-seller of soda ash. (4) Defendant Tenneco Minerals has entered into a joint venture with Japanese-owned ASAHI Glass, the largest Japanese producer of soda ash, to exploit Tenneco Minerals' soda ash reserves. (5) Defendant Kerr-McGee recently sold its soda ash reserves to North American Chemical Company, which is thirty-percent owned by the largest Korean producer of soda ash, Oriental Chemical Industries. (6) Only defendant FMC Wyoming Corporation is not linked to a foreign enterprise significantly engaged in the production or sale of soda ash or caustic soda.[2]

Prior to formation of ANSAC, the practice in the soda ash industry was for each producer to bargain individually for terminal rates and services. ANSAC changed this practice by negotiating on behalf of all of its members and demanding a common rate. As the operator of a principal terminal, IRM bargained for rates under both regimes. Its 1985 ANSAC-negotiated rate was significantly lower than the range of rates it had managed to negotiate with individual producers between 1982 and 1984; IRM attributes this reduction to the leverage imposed by ANSAC's collective bargaining. See 898 F.2d at 947-48.

In October of 1987, ANSAC moved its business from IRM to a rival terminal, operated by Hall Buck Marine Inc. (HBM), at the Port of Portland, Oregon. Less than a month later, IRM filed a one-count complaint in this district charging ANSAC and its members with conspiring to fix and depress prices for terminal services.[3]

IRM's complaint was dismissed on summary judgment by Judge Hannum, who concluded—on the basis of the complaint, the motion for summary judgment, and the motion's supporting

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2. Although formal discovery has not been conducted with regard to the question of foreign ownership, see note 5, *infra*, IRM has independently marshalled these facts and ANSAC acknowledged their veracity in oral argument before this court.

3. Advancing the same theory as Count I of the amended complaint, see note 1, *supra*, the original complaint alleged a cause of action under §1 of the Sherman Act. Unlike the amended complaint (see in particular Count II), the original complaint did not specifically mention ANSAC's as-of-then-incipient relationship with HBM. Cf. 716 F.Supp. at 193 (discussing ANSAC-HBM relationship in context of original complaint).

affidavits[4]—that ANSAC's trade practices "fall squarely within" the Webb-Pomerene exemption. 716 F.Supp. at 191. In so holding, Judge Hannum rejected IRM's contentions that ANSAC should be denied Webb-Pomerene status because (1) many ANSAC members are foreign owned, and (2) evidence may show that ANSAC's purpose in contracting with HBM "has gone beyond soda ash export and now, in reality, extends to the terminalling of white bulk chemical product," in contravention of the "sole purpose" clause of the Webb-Pomerene Act, see 15 U.S.C. §62, which limits the exemption to export-related activity. *Id.* at 193.

On appeal, the Third Circuit vacated the grant of summary judgment, holding that at least one factual issue—the nature of the ANSAC-HBM relationship—required further development before ANSAC's Webb-Pomerene defense could be properly assessed:

> Appellee says that there is nothing in his relationship with Hall Buck that affects his Webb-Pomerene status and appellant says that there is. We disagree with the district court's conclusion that 'a more developed record is not required. . . .' The district court cannot decide this issue properly until it has before it the facts as to the exact nature of that relationship.

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4. The Third Circuit explained the apparent lack of discovery as follows: ANSAC first articulated its position in a motion to dismiss, which Judge Hannum treated as a motion for summary judgment (because it relied on supporting affidavits), holding that IRM was "entitled to obtain sufficient discovery to develop a material fact issue" for the purpose of responding to the motion. However,

> IRM claims that, in spite of this ruling, it was never able to obtain the information it needed because defendants continued to object to all of its discovery as overbroad and unnecessary to the disposition of their motion to dismiss; specifically, IRM was unable to obtain a copy of ANSAC's lease with Hall Buck. In January, 1989, IRM filed a motion to compel discovery. It reports that the question of discovery was raised at an untranscribed conference on April 12, and that the court deferred the issue until oral argument on the defendants' motion. The court thereafter heard oral argument on the motion to dismiss, deemed it a motion for summary judgment, granted it, and denied the motion to compel discovery as moot.

898 F.2d at 948 (citation omitted). In short, summary judgment was granted "before the plaintiff was able to conduct effective discovery." *Id.* at 947.

898 F.2d at 950.

On remand, the case was reassigned to me because Judge Hannum was unwell. The parties then undertook discovery with respect to the ANSAC-HBM relationship.[5] The details of that relationship are now clear: On October 26, 1987, ANSAC and HBM entered into a "Terminaling Agreement" (the Agreement) under which ANSAC agreed, for an initial period of five years, to export an annual minimum of 500,000 tons of soda ash through HBM's Port of Portland terminal at a rate which was substantially lower than that which it had previously bargained for with IRM. At the close of five years, ANSAC would have the option to renew the Agreement according to the same terms.[6] If ANSAC should choose not to renew, the agreement provides as follows:

> The estimated cost of construction of the Terminal is $4,300,000. On the basis of this estimate, and an assumption that the investment cost will be amortized over fifteen (15) years, at the end of the initial five-year term of this Agreement, there will be an unamortized cost of $2,866,667. In the event that ANSAC does not renew the contract after the initial five-year term, ANSAC shall pay to Hall-Buck $1,433,333 within thirty

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5. Pursuant to my Order of July 3, 1990, the scope of discovery was initially limited to the issue of the ANSAC-HBM relationship, without prejudice to further discovery should it prove necessary. See transcript of telephone conference of June 26, 1990. Even though the Third Circuit had vacated Judge Hannum's grant of summary judgment in its entirety, the ANSAC-HBM relationship was the one area of factual uncertainty specifically identified by the Third Circuit as being worthy of further exploration. See 898 F.2d at 950. Upon completion of the limited discovery, ANSAC renewed its motion for summary judgment, and IRM filed its cross-motion. Thereafter, but prior to my disposition of the pending motions for summary judgment, IRM filed a motion to lift the stay on further discovery. However, because no further discovery is necessary to effect a disposition of this case—all facts pertinent to ANSAC's Webb-Pomerene defense having been formally discovered or independently marshalled by IRM—IRM's motion for further discovery will be denied as moot in the order accompanying this memorandum.

6. If ANSAC agrees to renew, the Agreement provides that, upon the close of a second five-year period, ANSAC would again be entitled to renew. See Article II §2(a).

> (30) days after completion of five years of operation, regardless of the actual investment cost and unamortized cost. *ANSAC shall have the option, exercisable by written notice to Hall-Buck, to require that an economic arrangement be entered into between ANSAC and Hall-Buck providing for ANSAC's ownership, in consideration for making the above referenced payment, of 50%, of the Terminal.* In such event, Hall-Buck shall be given a contract to operate the Terminal for the duration of the lease on a basis to be negotiated between both parties. *Parties agree that such 50 percent ownership interest by ANSAC is not intended to put ANSAC in the Terminalling business, but is rather intended to confer on ANSAC an appropriate equity interest in compensation for its contribution to the cost of the investment and that ANSAC shall have the right to sell, assign, or otherwise dispose of such ownership, provided however that Hall-Buck shall have the right of first refusal should ANSAC decide to sell its ownership interest.* (Emphasis added). Article 6, ¶7.

In other words, the Agreement provides for an ongoing commitment of capital by ANSAC to HBM, either in the form of rates paid on a guaranteed level of annual throughput or—if ANSAC elects not to renew after five years—in the form of a direct cash contribution to the terminal's unamortized costs. If ANSAC elects non-renewal, ANSAC has the further option of acquiring a fifty percent interest in the terminal.

In more general terms, the Agreement describes the relationship between the parties as follows:

> It is understood and agreed that Hall-Buck's operations hereunder are those of an independent contractor and that Hall-Buck has the authority to control and direct the performance of the details of the work hereunder, and it is further agreed that neither Hall-Buck nor any of Hall-Buck's employees are employees of ANSAC and that Hall-Buck is not, except as herein provided, subject to control by ANSAC. Article IV, ¶7.

Upon completion of discovery with regard to the ANSAC-HBM relationship, ANSAC and its members renewed their motion for summary judgment, and IRM filed its cross-motion. Hence, the present dispute.

II. Foreign Ownership of ANSAC Members

IRM contended before Judge Hannum, and now contends on remand, that ANSAC should be denied Webb-Pomerene status because of the substantial foreign ownership and/or control of all but one of ANSAC's members.[7] IRM submits that extensive foreign ownership or control undermines the basic purpose of the Webb-Pomerene Act—to enable American exporters to compete more effectively abroad. See, e.g., *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 206 (1968) ("The Webb-Pomerene Act was passed 'to aid and encourage our manufacturers and producers to extend our foreign trade.' H.R. Rep. No. 1118, 64th Cong., 1st Sess., 1 (1916). Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels.").[8] Given what it perceives as an inconsistency between the Act's underlying purpose and ANSAC's membership structure, IRM maintains that ANSAC is not entitled to the exemption as a matter of law.

IRM's position—that an association's Webb-Pomerene status is defeated by pervasive foreign ownership or control—is not supported by any authority. The language of the Webb-Pomerene Act imposes no such qualification on membership,

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7. Judge Hannum concluded that "[t]here is no support in the statutory language [or in its legislative history] authorizing this Court to strip ANSAC of Webb-Pomerene protection because of foreign ownership interests." See 716 F.Supp. at 193 & n.4. Although IRM reiterated its position on appeal, see 898 F.2d at 949, the Third Circuit did not reach the issue of foreign ownership in vacating Judge Hannum's ruling.

8. As Judge Hannum observed, "Congress enacted the Webb-Pomerene Act in 1918 'to encourage American exports by exempting exports from constraints which placed them at a competitive disadvantage in foreign trade.' *Horizons International, Inc. v. Baldridge*, 811 F.2d 154, 163 (3d Cir. 1987)." 716 F. Supp. at 191-92. See also *United States v. Concentrated Phosphate Export Association*, *supra*, 393 U.S. at 211-12 (White, J., dissenting).

and there appears to be nothing in the Act's legislative history which indicates that foreign ownership or control is to be a significant factor in determining whether the exemption applies.[9] Moreover, there appears to be no judicial or administrative authority which supports the proposition that membership in a Webb-Pomerene association turns on whether (or to what extent) a corporation is foreign owned or controlled.[10]

Nor does it follow by simple syllogism that foreign ownership is necessarily at odds with the design of the Webb-Pomerene Act to confer domestic benefits: by virtue of the exemption the Act provides, American producers, workers, and raw mate-

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9. To the contrary, proposed amendments seeking to limit membership in a Webb-Pomerene association to corporations that are either completely or substantially American owned were considered and rejected by Congress. See CONG. REC. 13730-31 (1916).

10. To support its argument, IRM relies on several FTC decisions, each recognizing a form of activity undertaken by a Webb-Pomerene association in conjunction with a foreign enterprise to be unprotected by the Act. See IRM's brief at 55-57. However, all of these decisions involve forms of activity not at issue in this case; none of them suggests that there is anything contrary to the Act where, as here, the association—though comprised in part of foreign subsidiaries—has done nothing more than to bargain and contract for domestic terminal services in furtherance of its export trade.

Thus, although the FTC held in *In re Phosphate Export Association*, 42 F.T.C. 555 (1946)—a case, which counsel for IRM stated in oral argument to be the case most pertinent to the instant dispute—that "[i]t was not consistent with the terms and purposes of the Webb-Pomerene Act for [an association] to accept as a member the subsidiary of a foreign purchaser or potential customer of phosphate," what was dispositive in the view of the FTC was the fact that the member in question, which happened to be a subsidiary of a foreign corporation, "was never itself a producer of phosphate rock . . . . [nor] actually engaged in the exportation of phosphate from this country. . . . [Its] participation . . . was an activity in the course of the import trade into Europe rather than in the course of export trade from the United States. *Id.* at 843-44. See also *In re General Milk Co.*, 44 F.T.C. 1355, 1411 (1947) ("The Commission is unwilling to place the stamp of administrative approval upon the association's ownership of foreign subsidiaries which are not engaged in any respect in the exportation of milk products from the United States."); *United States v. Minnesota Mining and Manufacturing Co.*, 92 F. Supp. 947, 963 (D.C.Mass. 1950) ("And unlike a combination of producers to unite in exporting to foreign countries, a combination of producers to unite in manufacturing in foreign countries has not the benefit of the statutory immunity of the Webb-Pomerene or any other Act of Congress.").

rials encounter fewer competitive obstacles and thereby command easier access to international markets than would be the case if they were afforded no antitrust immunity. In other words, an export exemption can advance American interests, even though various exporters may be foreign owned or controlled. Of course, it can be plausibly argued that the privilege of antitrust exemption should only be extended to export enterprises most or all of which are not subject to foreign control. However, it is up to Congress, not this court, to fashion the nation's trade policies within the broad limits set by the Constitution's commerce clause.

Accordingly, I conclude that ANSAC's Webb-Pomerene status is not diminished by the circumstance that most ANSAC members are foreign owned or controlled.

III. The ANSAC-HBM Relationship

IRM also contends that ANSAC should be denied immunity because its relationship with HBM is not for the "sole purpose" of export trade and thus exceeds the scope of the Webb-Pomerene exemption. See 15 U.S.C. §62. Advancing the same argument it made before Judge Hannum, this time equipped with evidence obtained through discovery and with an affidavit by an expert, Professor Herbert R. Northrup, who has analyzed that evidence and endeavored to spell out its economic implications, IRM submits that the ANSAC-HBM Agreement, and the relationship it entails, have effectively made ANSAC a participant in the general business of terminalling, in addition to its being a participant in the business of export trade.

IRM's position that the ANSAC-HBM relationship is not confined to export trade rests on a number of related claims: *First*, IRM claims that construction of HBM's Port of Portland Terminal would not have been completed but for ANSAC's annual guarantee of a minimum of 500,000 metric tons of soda ash throughput, as provided in the ANSAC-HBM Agreement. According to IRM, this guarantee made the terminal "bankable;" it created a solid business base for obtaining further financing. *Second*, IRM claims that HBM arranged, in return for ANSAC's guarantee, to have ANSAC's rate for terminal services subsidized by other terminal users. That is, ANSAC's

relatively lower rate is said to be the result of correspondingly higher rates charged other terminal users.[11] In this way, IRM submits, ANSAC profits from the general business of the terminal. *Third*, ANSAC's future prospect of becoming (if it so chooses) a fifty percent owner of HBM's terminal, as contemplated by the renewal-default provision recited in the ANSAC-HBM Agreement, creates for ANSAC a present economic interest in the general business and overall prosperity of the terminal.[12]

Yet, none of these allegations can sustain the claim that ANSAC has made any agreement or done any act which exceeds the scope of the protection provided by the Webb-Pomerene Act for "agreement[s] made or act[s] done *in the course of export trade*." 15 U.S.C. §62 (emphasis added). There is no feature of the ANSAC-HBM relationship that goes so far as to make ANSAC a direct participant, investor, or privileged beneficiary in HBM's terminal operations. That ANSAC's annual guarantee was the *sine qua non* of HBM's Port of Portland terminal, effectively underwriting the completion of construction, does not tend to establish that ANSAC was undertaking to

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11. Here, IRM relies primarily on the deposition testimony of John William Reinacher, Director of Distribution of ANSAC, who explained, interpreting notes from a May 1987 ANSAC-HBM meeting, that

> my understanding was that they were offering us a base load contract for our commitment which would give them the ability to go forward with construction, and that they would then solicit other products and other non-ANSAC soda ash business at higher levels than what they were offering us as a base load commitment.

See Reinacher Deposition at 56-57, Exhibit "F" to Northrup Affidavit.

12. Professor Northrup states in his affidavit, ¶ 9:

> ANSAC's economic interest in the Port of Portland terminal is clearly evidenced by the terms of the agreement of October 26, 1987, between HBM and ANSAC. These terms include a commitment by ANSAC to pay for unamortized construction costs of the terminal in the case of contract non-renewal and the concomitant fifty percent ownership position that would be conferred upon ANSAC as a result. The economic interest is also evidenced by ANSAC's dual role as facilitator of the terminal's construction and benefactor of its operation. Because of its economic interest in the bulk outloading terminal, ANSAC is in fact participating in the business of terminalling not only soda ash, but also other products . . .

advance any interest beyond that of securing a viable and efficient terminal for loading and throughputting its exports. Similarly, there is nothing to indicate that the lower rate received by ANSAC, even if subsidized to some degree by higher rates charged other terminal users, serves any purpose other than to enhance the capacity of ANSAC members to compete effectively in world markets.[13]

Finally, the fact that ANSAC maintains an option, exercisable upon the close of the initial five-year period, to acquire fifty percent of the equity in HBM's terminal, does not add any meat to the theory that ANSAC has entered the general business of terminalling. ANSAC currently maintains no equity share in the terminal, and it is not clear that it will exercise its option and procure an equity share in the future. Thus, as things now stand, ANSAC's joint-ownership of HBM's terminal is a possibility, not a reality. Furthermore, ANSAC's future prospect of co-owning the terminal does not create for it a present economic stake in the general operations of the terminal different from that of any other terminal user; all users of HBM's terminal have an interest in the terminal's overall success and prosperity insofar as their business depends on it.

In short, even though it is not inconceivable that ANSAC may one day enter a relationship with HBM that would jeopardize its Webb-Pomerene status, that point has not been reached as of yet. The evidence of record, though providing a full view of the ANSAC-HBM relationship, cannot be construed as suggesting that ANSAC's current relationship with HBM at the Port of Portland terminal in any way exceeds the scope of activity permitted by the Webb-Pomerene Act as activity done "in the course of export trade."

It may be true, as IRM points out, that ANSAC receives a number of indirect economic benefits through its relationship with HBM at the Port of Portland terminal. And it may be true

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13. There is no reason to suspect that ANSAC's low rate is anything more than a volume discount, such as would be provided to any other large customer. The rate does not function as a profit-share in that it does not vary depending on the terminal's overall success.

that the ANSAC-HBM relationship generates a number of adverse collateral effects, such as higher rates charged other terminal users and lower use of competing terminals by association members.[14] However, these effects are not a basis for stripping ANSAC of its Webb-Pomerene status; rather, they are the "inevitable consequences" of legislation designed to promote American export trade at the risk of inducing and enduring some anti-competitive practices. See *United States v. Minnesota Mining and Manufacturing Co.*, *supra*, 92 F. Supp. at 965.[15]

ANSAC's relationship with HBM, albeit complex, and though certainly involving more than a standard stevedoring agreement to have HBM's terminal load ANSAC's products, still fits wholly within the bounds of the antitrust exemption provided

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14. To the extent that IRM's antitrust claims are predicated on the allegation (or, at least, the implication) that ANSAC's anti-competitive practices have had and continue to have an adverse and impermissible impact on the domestic soda ash industry, unrelated to and not excused by ANSAC's export activity, see 15 U.S.C. §62 (Webb-Pomerene association may not "enter into any agreement . . . or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."), I conclude that IRM—as neither a consumer or producer of soda ash—has no standing to assert such claims. For the same reason, I conclude that IRM is not entitled to discovery to explore alleged collusive activity by ANSAC directed at domestic competition within the soda ash industry. Cf. note 5, *supra* (explaining limitations imposed on discovery in the course of this litigation).

15. In *Minnesota Mining*, Judge Wyzanski stated in pertinent part: "Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function." 92 F. Supp. at 965.

by the Webb-Pomerene Act for the purpose of promoting American export trade.[16]

IV. Conclusion

Pursuant to the remand directed by the Court of Appeals, sufficient discovery has now been completed to reach summary judgment on ANSAC's Webb-Pomerene defense, which, if sustained, is an absolute defense to the antitrust causes of action recited in IRM's amended complaint. For the reasons discussed above, I conclude that ANSAC qualifies for the exemption provided by the Webb-Pomerene Act and has therefore asserted a valid Webb-Pomerene defense. Accordingly, in the Order accompanying this memorandum, I will grant ANSAC's motion for summary judgment and deny IRM's cross-motion for summary judgment.

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16. Thus, although the FTC has rejected as inconsistent with the Act those arrangements in which an association has in the course of its activity colluded with non-members, participated in foreign manufacture, impeded the flow of imports, or denied terminal access to competitors, see *supra* note 10; cf. *In re Florida Hard Rock Phosphate Export Association*, 40 F.T.C. 843, 860-61 (1945) (Webb-Pomerene Act does not permit association to exercise its control of a terminal by excluding non-association members); *In re Export Screw Association of the United States*, 43 F.T.C. 980 (1947) (Webb-Pomerene Act does not permit association to include non-members in price-fixing or to restrain foreign imports); *In re Sulphur Export Corp.*, 43 F.T.C. 820 (1947) (Webb-Pomerene Act does not permit association to collude with non-members to restrict imports), I am aware of no instance in which the FTC or any other administrative authority or court has thought it necessary to preclude a Webb-Pomerene association from contracting to procure the services of a more cost-effective terminal as a means of enhancing its export trade.

JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 87-7541

INTERNATIONAL RAW MATERIALS, INC.
Plaintiff

v.

STAUFFER CHEMICAL COMPANY,
TG SODA ASH, INC.,
GENERAL CHEMICAL PARTNERS,
TENNECO MINERALS COMPANY,
FMC WYOMING CORP.,
KERR-McGEE CHEMICAL CORP.,
AMERICAN NATURAL SODA ASH CORP.
Defendants

Decided: June 13, 1991.
Filed: June 17, 1991

CIVIL JUDGMENT

Before the Honorable Louis H. Pollak

AND NOW, this 14th day of June, in accordance with the Memorandum and Order dated June 13, 1991,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendants Stauffer Chemical Co., TG Soda Ash, Inc., General Chemical Partners, Tenneco Minerals Co., FMC Wyoming Corp., Kerr-McGee Chemical Corp., and American Natural Soda Ash Corp. and against Plaintiff International Raw Materials, Inc.

BY THE COURT,

ATTEST: /s/Donna Whittington
Donna Whittington
Deputy Clerk

[ENTERED: June 17, 1991]

OPINION OF THE THIRD CIRCUIT IN NO. 89-1546

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1546

INTERNATIONAL RAW MATERIALS, LTD.,
Appellant

v.

STAUFFER CHEMICAL COMPANY,
TG SODA ASH, INC.,
GENERAL CHEMICAL PARTNERS,
TENNECO MINERALS COMPANY,
FMC WYOMING CORP.,
KERR-McGEE CHEMICAL CORP.,
AMERICAN NATURAL SODA ASH CORPORATION
Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 87-7541)

Argued November 16, 1989

Before: HIGGINBOTHAM, *Chief Judge*, SCIRICA, *Circuit Judge*, and POLITAN, *District Judge*

Filed March 21, 1990
Amended March 22, 1990

OPINION OF THE COURT

A. Leon Higginbotham, Jr., *Chief Judge*.

This is an appeal by plaintiff, International Raw Materials, Ltd. ("IRM"), from a summary dismissal of a suit alleging that the defendants, who include the major producers of soda ash in the United States, conspired to fix the rates of domestic termi-

nalling services for soda ash in violation of § 1 of the Sherman Act, 15 U.S.C. §§ 1-7 (1988). The district court treated the defendants' motion to dismiss as a motion for summary judgment and granted it before the plaintiff was able to conduct effective discovery. The court found that the defendants were exempt from liability under the Sherman Act because of their certification as exporters under the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1988). Because we find that there are genuine issues of material fact that should be explored and resolved, we will vacate the judgment and remand to the district court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

IRM is the operator of a terminal in Port Longview, Washington which is used to load "white bulk product," primarily soda ash, onto ocean-going vessels.[1] Defendants are the American Natural Soda Ash Corporation ("ANSAC") and its member organizations: Stauffer Chemical Company, TG Soda Ash, Inc., General Chemical (Soda Ash) Partners, Tenneco Minerals Company, FMC Wyoming Corporation and Kerr-McGee Chemical Corporation. Each of the member organizations is a United States corporation or partnership with its principal place of business in the United States. Several of them are owned wholly or partly by foreign companies. Stauffer Chemical Co. is wholly owned by Rhone Poulenc Chemie S.A., a French corporation and one of the largest producers of soda ash in the world. TG Soda Ash is owned by the French chemical conglomerate, Societe Nationale Elf Aquitaine. General Chemical Partners is forty-nine percent owned by Australian Consolidated Industries.

ANSAC was organized in 1983 as a United States export association and registered with the Federal Trade Commission under the Webb-Pomerene Act. The Webb-Pomerene Act was passed to allow United States companies exporting United States products to compete more effectively in the world market. H.R. Rep. No. 1056, 64th Cong., 2d Sess. 1-2 (1917); S.Rep.

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1. Soda ash is a white granular substance used primarily in the production of glass. Other white bulk products include sodium sulfate, urea, zinc oxide, talc, phosphatic fertilizers and bentonite.

No. 1118, 64th Cong., 1st Sess. 1 (1916). It provides a limited exception to the Sherman Act prohibition on acts in restraint of trade when those acts are performed by certified United States organizations engaged solely in export trade and the acts are in the course of their export trade. ANSAC's Certificate of Incorporation and its membership agreement establish that it was organized to engage solely in export trade in soda ash. ANSAC maintains that loading its soda ash onto ships (i.e., terminalling) is an act in the course of its export trade.

Between 1982 and 1984, IRM entered into separate terminalling agreements with several of the major soda ash producers who now belong to ANSAC. The rates on these contracts ranged from $5.65 to $8.46 per metric ton, depending on volume. After ANSAC was formed, each of the defendants who then had a contract with IRM assigned it to ANSAC and advised IRM to negotiate solely with ANSAC for future terminalling contracts. A July 1985 agreement between IRM and ANSAC for terminalling services set the rate per metric ton at between $3.72 and $4.72. IRM argues that the reduction in rates was a result of ANSAC's price-fixing in violation of the Sherman Act, while ANSAC claims that its negotiations for terminalling prices fall within the exception provided by the Webb-Pomerene Act.

In 1987, the Port of Portland, Oregon entered into a lease with Hall-Buck Marine Inc. ("Hall Buck") for land on which Hall Buck was to build a terminal in the Port of Portland for the loading of white bulk product, not limited to soda ash. The lease provides that the premises leased shall be used only for "[c]onstruction and operation of a facility for the export of soda ash and compatible mineral bulk products." Appendix ("App.") at 202. At the same time, ANSAC and Hall Buck entered into a five-year contract that included two five-year renewal options. As reported in the press, the agreement provided that ANSAC would guarantee a minimum annual shipment of 500,000 metric tons of soda ash through the Portland facility. IRM claims that this agreement allowed Hall Buck to finance construction of the terminal. IRM also alleges that the agreement between Hall Buck and the Port of Portland in effect put ANSAC into the terminalling business because through it ANSAC financed the

building of the terminal to be used for products other than soda ash, and the agreement contemplated "the actual existence or formation of a joint venture between Hall Buck and ANSAC to operate the terminal." Appellant's Brief ("Applt's Br.") at 8 (citing App. at 122). It provides that "[t]he parties recognize that, during the term of this Agreement, Hall-Buck and ANSAC may form a new joint venture to operate the facility." App. at 225.

IRM filed suit in district court in November 1987, alleging that the members of ANSAC, who account for virtually all of the soda ash production in the United States, were conspiring in a horizontal price-fixing scheme, in violation of the Sherman Act, to depress terminalling prices through their monopoly. IRM submitted interrogatories and document requests and the defendants responded by moving for dismissal under Fed. R. Civ. P. 12(b)(6), claiming, as a matter of law, that their certification under the Webb-Pomerene Act exempted them from liability.

The district court considered the motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 56, and initially denied it by an order dated February 10, 1988, holding that IRM was "entitled to obtain sufficient discovery to develop a material fact issue" for the purpose of responding to the motion. The court explained that "[t]o limit [IRM's] ability to conduct discovery as contemplated by the defendants, would deny [IRM] its rights under the Federal Rules of Civil Procedure." App. at 115.

IRM claims that, in spite of this ruling, it was never able to obtain the information it needed because defendants continued to object to all of its discovery as overbroad and unnecessary to the disposition of their motion to dismiss; specifically, IRM was unable to obtain a copy of ANSAC's lease with Hall Buck. In January, 1989, IRM filed a motion to compel discovery. It reports that the question of discovery was raised at an untranscribed conference on April 12, and that the court deferred the issue until oral argument on the defendants' motion. Applt's Br. at 4. The court thereafter heard oral argument on the motion to dismiss, deemed it a motion for summary judgment, granted it, and denied the motion to compel discovery as moot.

II. DISCUSSION

In reviewing a grant of summary judgment, we apply the same test that the district court should have applied under Fed. R. Civ. P. 56. Summary judgment is appropriate if "there was no genuine issue as to any material fact and . . . the moving party . . . is entitled to a judgment as a matter of law." *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986) (citation omitted), *modified in part*, *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1986); *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974). The facts must be viewed in the light most favorable to the party opposing summary judgment. *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d at 568.

IRM appeals the district court's grant of summary judgment on several grounds. First, it argues that when a case presents a novel issue of law (here, the use of the Webb-Pomerene Act as a defense to a private civil suit alleging antitrust violations), judgment should be deferred until an adequate factual record can be established. 10A C. Wright, A. Miller and M. Kane, *Federal Practice & Procedure* § 2728 at 191 (1983); *see also Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967). Second, IRM contends that defendants' price-fixing in the terminalling of its product is a domestic activity that falls outside the Webb-Pomerene exception as shown by the express language of the statute and by its legislative history. Third, IRM questions whether ANSAC actually qualifies for Webb-Pomerene certification when two of its members are wholly owned subsidiaries of foreign soda ash producers and another is almost half owned by a foreign company. It claims that to certify such an organization defeats the purpose of the Webb-Pomerene Act, which was meant to give United States companies engaged solely in export an advantage in competing with foreign companies. Fourth, IRM argues that, even if ANSAC was properly certified under the Act, ANSAC and its members have lost their exemption from the Sherman Act by entering the domestic terminalling business themselves for products other than soda ash, in violation of the Webb-Pomerene's Act's limitation of an association's activities to export trade in the product for which it is certified.

It contends that issues of material fact regarding the defendants' role in the new Port of Portland terminal preclude summary judgment. Applt's Br. at 14.

This court has said, in another private antitrust suit, that "where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 444 (3d Cir. 1977) (quoting *Castlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977)) (citing *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973)), *cert. denied*, 434 U.S. 1086 (1978). *See also Arnold Pontiac-GMC, Inc. v. General Motor Corp.*, 786 F.2d at 568 (summary judgment in antitrust cases before plaintiff has had full opportunity for discovery may be reversible error). This appeal raises complex questions of antitrust law, and a more complete factual record would be helpful to the resolution of some of them. There may be antitrust cases in which it is proper to grant summary judgment prior to effective discovery, but we would be reluctant to do so here.

Appellant has alleged that because the appellees were uncooperative in discovery, it could not obtain the information it needed regarding appellee's relationship with Hall Buck, and it seeks the opportunity to develop the factual record more fully. It claims that the relationship involves ANSAC in activities in violation of its status as a Webb-Pomerene organization. In his affidavit, the president of IRM said that,

> [a]ccording to [the lease], the new terminal facility is not limited to the soda ash business and ¶9.1 anticipates a joint venture between ANSAC and Hall Buck to operate the terminal. As a result, ANSAC is *de facto* entering into the general business of terminalling services in white bulk chemical products.

App. at 123. IRM cannot substantiate its allegations on the basis of the present record, but it believes it can substantiate them through full discovery. We cannot say whether or not it will be able to do so. However, we hold that its allegations may present a disputed question of material fact that precludes summary judgment prior to discovery when the appellees have the facts in their possession.

In its memorandum opinion, the district court said, "if IRM were to aver that ANSAC has been directly profiting from the terminalling services of other export products, such conduct would not fall within this exemption." App. at 434. The district court suggests that only once the profits start to roll in does a joint venture to profit from terminalling export products other than soda ash become relevant to the exemption of ANSAC as a Webb-Pomerene organization. We suggest that the court need not wait so long before taking notice. If, for example, an agreement were already in place for ANSAC to profit by such exports in the future, that agreement could also be relevant. Appellee says that there is nothing in his relationship with Hall Buck that affects his Webb-Pomerene status and appellant says that there is. We disagree with the district court's conclusion that "a more developed record is not required . . . ." App. at 428. The district court cannot decide this issue properly until it has before it the facts as to the exact nature of that relationship.

III. CONCLUSION

In vacating the district court's grant of summary judgment, we take no stand on any of the substantive issues of law relating to the Sherman Act and the Webb-Pomerene Act raised by appellant. We merely hold that the grant was premature, and that a factual record should be developed through discovery as a basis for resolving questions of disputed issues of material fact. Accordingly, we will vacate the grant of summary judgment and remand to the district court for proceedings consistent with this opinion.

OPINION OF THE THIRD CIRCUIT IN No. 89-1546

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1546

INTERNATIONAL RAW MATERIALS, LTD.,
Appellant

v.

STAUFFER CHEMICAL COMPANY,
TG SODA ASH, INC.,
GENERAL CHEMICAL PARTNERS,
TENNECO MINERALS COMPANY,
FMC WYOMING CORP.,
KERR-McGEE CHEMICAL CORP.,
AMERICAN NATURAL SODA ASH CORPORATION
Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 87-7541)

Filed March 21, 1990
Amended March 22, 1990

Present: HIGGINBOTHAM, *Chief Judge,* SCIRICA, *Circuit Judge,* POLITAN, *District Judge*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 16, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said District Court entered June 23, 1989, be, and the same is hereby vacated and the case remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:
/s/ Sally Mrvos
Clerk

March 21, 1990

Section One of the Sherman Act

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section Four of the Clayton Act

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * *

The Webb-Pomerene Act

15 U.S.C. § 61. Export trade; definitions

The words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

The words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

The word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

15 U.S.C. § 62. Export trade and antitrust legislation

Nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies,"

approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

15 U.S.C. § 63. Acquisition of stock of export trade corporation

Nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

15 U.S.C. § 64. Unfair methods of competition in export trade

The prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

15 U.S.C. § 65. Information required from export trade corporation; powers of Federal Trade Commission

Every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract or association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic com-

petitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."